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91-1923

No. 91-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

-against-

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Dated: *New York, New York*
May 26, 1992

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QUESTION PRESENTED FOR REVIEW

Whether a Pennsylvania cognovit judgment, entered without prior notice and an opportunity to be heard is entitled to be given full faith and credit effect in light of D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972), where there are no undisputed facts which support a finding of a knowing, voluntary and intelligent waiver of due process, and where there was no hearing prior to the entry of judgment in the sister state under full faith and credit to determine whether a knowing, voluntary and intelligent waiver of due process rights was in fact made?

PARTIES TO THE PROCEEDING

The parties to this proceeding are those named in the caption. There are no parent companies or subsidiaries of Petitioner Oakwood Plaza Shopping Center, Inc.

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OPINIONS BELOW

The New York State Court of Appeals affirmed the Order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, which

affirmed the Order of the Supreme Court of the State of New York, County of New York, in an Opinion dated and entered on December 23, 1991, which is reproduced in the Appendix and published (*Leonard S. Fiore, Sr., et al. v. Oakwood Plaza Shopping Center, Inc., et al,* 78 N.Y.2d 572, 578 N.Y.S.2d 115 (1991)). A Motion for Reargument to the Appellate Division, First Judicial Department was denied in an unpublished Order dated May 9, 1991, which is reproduced in the Appendix. A Motion for Reargument to the Court of Appeals was denied in an unpublished Order dated February 25, 1992, which is reproduced in the Appendix. The Decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department is also reproduced in the Appendix and has been published (*Leonard S. Fiore, Sr. et al. v. Oakwood Plaza Shopping Center, Inc., et al.*, 164 A.D.2d 737, 56 N.Y.S.2d 799 (1st Dept. 1991)), as is the unreported Decision of the Supreme Court of the State of New York, County of New York.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fourteenth Amendment's Due Process Clause:

> ... nor shall any State deprive any person of life, liberty, or property without due process of law...

U.S. Const., Amend. XIV, Section 1; and

Article IV's Full Faith and Credit Clause:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Article IV, Section 1.

STATEMENT OF THE CASE

A. Factual Overview

Petitioners Joseph Aronow and Anthony Galioto ("Petitioners"), two New Yorkers, contracted to purchase a piece of land in Pennsylvania from Respondents, local businessmen. The contract obligated Respondents to obtain all necessary permits required so that Petitioners could build a shopping center of at least 161,200 square feet. This obligation survived the closing. Petitioners' obligation to pay Respondents was dependent upon Petitioners' ability to build at least 161,200 square feet, and was to be $ 9.00 per square foot of buildable space. The contract also required that the mortgage and so-called "Bond and Warrant" be in Pennsylvania statutory form.

At the closing, Petitioners were presented with various documents, which were prepared by Respondents' attorneys. Petitioners were not represented by counsel; although Petitioner Aronow is a New York attorney, he is not familiar with Pennsylvania laws.

Among these many documents was the pre-printed "Bond and Warrant", the face amount of which was $1.1 million. However, Petitioners' liability under the Bond and Warrant was dependent upon the obtaining by Respondents of all permits required to build a shopping center of at least 161,200 square feet. This condition was contained in a heavily negotiated typed and hand written rider to the

pre-printed Bond and Warrant.

In the *pre-printed* portion of the Bond and Warrant was a provision called a "cognovit" clause. This clause authorized Respondents' attorney to enter a judgment for the face amount of the document, without prior notice to the Petitioners, and irrespective of the conditions contained in the rider. Nowhere in the contract of sale was there any authorization, covenant or direction for the inclusion of a "cognovit" provision in the closing documents.

Petitioners signed the Bond and Warrant, containing the cognovit clause. However, Petitioners did so without knowledge of the presence of the cognovit provision. In fact, there are no indicia of Petitioners' knowledge of the cognovit provision, such as Petitioners' initials by that provision.

Petitioners signed the Bond and Warrant in reliance upon Respondents' obligation to present Pennsylvania statutory forms. In fact, the Bond and Warrant signed was not a Pennsylvania statutory form. The statutory form does not contain a "cognovit" clause or provision.

Whereas the typed and hand written rider was the focal point of heavy negotiations, the cognovit provision was not discussed at all, and Petitioners received no special consideration whatsoever for the pre-printed cognovit provision.

Subsequent to the closing, Respondents' failed to obtain the permits required to build a shopping center, and

Petitioners ceased payments under the Bond and Warrant.

Respondents, without giving any notice whatsoever to Petitioners, entered judgment against Petitioners in Pennsylvania by filing the cognovit with the Clerk of the Court. This Clerk, called the Prothonotary, ministerially entered the judgment and *then* sent a letter notifying Petitioners that there was a judgment against them in Pennsylvania.

Respondents then moved in the Supreme Court of the State of New York, New York County for Summary Judgment in lieu of Complaint on the Bond and Warrant under Civil Practice Law and Rules § 3213. However, upon a finding that a motion under Section 3213 was inappropriate and untenable, Respondents converted their "3213" action on a note to an action on the Pennsylvania cognovit judgment, seeking to enforce said judgment in New York State under the cloak of full faith and credit.

B. The Supreme Court of the State of New York ("Lower Court")

In an *affidavit in opposition* to Petitioners' cross motion to dismiss, Respondents for the first time raised the Pennsylvania cognovit judgment, when they referred to Respondents' "...Motion for Summary Judgment to enforce their validly entered Pennsylvania judgments..." (RA 179, para. 48).[1]

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[1] "RA ___" refers to the page number of Petitioners' Record on Appeal to the New York State Court of Appeals.

Petitioners responded to the raising of the Pennsylvania Cognovit Judgments by asserting that the cognovit judgment violated Petitioners' due process rights, thereby not entitling said judgment to full faith and credit enforcement in New York. In support of this, Petitioners attested to the facts that (i) they failed to receive notice of the cognovit proceeding prior to entry of judgment, (ii) they did not understand that they were signing a document containing a provision which authorized Respondents to *ex parte* enter judgment against them, (iii) they relied upon Respondents for the preparation of the documents, and upon Respondents' representations that the documents were fair and equitable to both sides and required under Pennsylvania law, (iv) they received no additional or special consideration for the inclusion of the cognovit provision, and (v) cognovit judgments are not accorded full faith and credit treatment in this State. See generally the affidavit of Petitioner Galioto sworn to on April 17, 1989 (RA 318 - 320, paras. 2 - 6); the affidavit of Petitioner Aronow sworn to on April 20, 1989 (RA 321 - 323; paras. 7 - 11); Aronow's affidavit sworn to on April 24, 1989 (RA 324 - 326; paras. 11 - 14, 17).

Specifically, Petitioner Galioto stated the following in his affidavit sworn to on April 17, 1989 (RA 318 - 320):

> "2) ...In this Pennsylvania procedure, I was given absolutely no notice of the action prior to its being brought before the Prothonotary. Instead, I was only given notice after the judgment had been entered against me through this ministerial act."

"3) ...I do not recall ever having had this document explained to me. Certainly, I would not have entered into this document had I been made aware of its potential consequences, which have, in fact, left me defenseless against a judgment of over $1,000,000.00..."

"6) In short, a Judgment of over $1,000,000.00 is rendered against me, of which Judgment I have received no prior notice. I understand from my New York attorneys that this Judgment entered based upon a Warrant of Attorney, has been found by the New York Court of Appeals to be in violation of my due process."

Petitioner Aronow stated the following in his affidavit sworn to on April 20, 1989 (RA 321 - 323):

"7. The New York State constitution requires notice of a hearing prior to the entry of judgments and of course the U.S. Constitution Due Process requires notice prior to a final judgment."

"8. The Pennsylvania filing of the cognovit judgment (like a mechanics lien) should not be regarded as a final judgment."

"9. In the instant matter, at the time of signing the mortgage documents, your deponent was offered no consideration for the cognovit judgment signing. The mortgage documents were prepared exclusively by plaintiffs (only the hand written portions calculating the amounts was done by defendant) and your deponent was led to believe that the forms for this mortgage were the standard and were statutorily required under Pennsylvania law to effect a mortgage and bond.

"10. ...your deponent feels he is being caught between two processes as explained by his counsel's Memorandum of Law, where a process like a mechanics lien in one state, but for historical or other reasons sounding like a judgment, is being made into a judgment in this state. I hope the line of cases given by counsel will clarify this point and show how this state does not and cannot enforce a mechanics lien cum [sic] judgment as a judgment of the foreign state."

"11. This summons and complaint is in fact a new action in this state without any enforceable foreign judgment in the full faith and credit sense of foreign judgments, and this court should consider this matter on the factual merits only."

Petitioner Aronow further stated the following in his affidavit sworn to on April 24, 1989 (RA 324-326):

"11. It was never explained by plaintiffs that contrary to the contract they were preparing cognovit judgments."

"12. At closing the plaintiffs presented the package of mortgage documents for signatures and the printed forms were signed perfunctory without study, relying on them to be in *statutory Pennsylvania form* and relying on statutory forms being fair and equitable to both sides..."

"14. Plaintiffs introduced the sued upon cognovit judgments under the guise that this was a statutory standard document required for this type of transaction."

"17. The plaintiffs have not disclosed to the court in Pennsylvania...that they obtained the cognovit powers by preparing papers that should have been

> the statutory standard document for a mortgage and note."

The Lower Court granted summary judgment upon its finding that the cognovit judgment entered in Pennsylvania did comply with due process requirements and was, therefore entitled to full faith and credit in this State. Specifically, the Lower Court held the following:

> "With respect to the two Pennsylvania Judgments, the notice and opportunity to be heard requirements mandated by Pennsylvania law and the due process clause of the Constitution have been met" (RA 8), and
>
> "...it is well settled law that a judgment is entitled to full faith and credit if it is...consistent with the due process requirements of the U.S. Constitution. U.S.C.A. Const. Art. IV, Sec. 1; 28 U.S.C.A. [Sec] 1738; *see Atlas Credit Corp. v. Ezrine*, 25 NY2d 219." (RA 11)

C. The Appellate Division of the Supreme Court of the State of New York ("Appellate Division")

The Appellate Division, in affirming the Lower Court, found that the cognovit judgment entered in this case did comport with the requirements of due process:

> "Under the circumstances herein, where the parties were engaged in an arms length business transaction, were represented by counsel, and the defendant was on actual notice of the entry of the judgment and, in fact, sought to challenge same prior to execution, it cannot be said that the

cognovit judgment amounted to a deprivation of property rights without due process."

The Appellate Division denied a Motion for Reargument on May 9, 1991.

D. The New York State Court of Appeals ("Court of Appeals")

The Court of Appeals affirmed the Decision of the Appellate Division. In so doing the Court of Appeals rejected Petitioners' factual assertions that they did not knowingly, voluntarily and intelligently waive their due process rights, and held that, under the facts of this case, Petitioners had made an effective waiver of due process. The Court of Appeals denied a Motion for Reargument on February 25, 1992.

REASONS FOR GRANTING THE WRIT

A. Supreme Court Rule 10.1 Considerations.

The issue in this case is whether a Pennsylvania cognovit judgment, entered without prior notice and an opportunity to be heard, is entitled to be given full faith and credit effect in light of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S. Ct. 775, 31 L.Ed.2d 124 (1972), where there are no undisputed facts which support a finding of a knowing, voluntary and intelligent waiver of due process, and where there was no hearing prior to the entry of judgment in the sister state under full faith and credit to determine whether a knowing, voluntary and intelligent waiver of due process rights was in fact made. Thus, this Court should grant certiorari to resolve the conflict between *Overmyer* (which held that on the *undisputed* facts before it, an effective waiver of due process had been made), and the New York Court of Appeals' decision in this case, which made the same determination on *disputed* facts, and where no evidentiary hearing on the issue of waiver had been conducted in any lower New York Court.

This case also merits this Court's review because of the conflict between the New York Court of Appeals in this case, and the Third Circuit Court of Appeals in *FRG, Inc. v. Manley*, 919 F.2d 850 (3rd Cir. 1990), and the Supreme Court of the State of California in *Isbell v*

County of Sonoma, 145 Cal.Rptr. 368, 577 P.2d 188 (Cal.S.Ct. 1978).

In *FRG*, *supra*, the Third Circuit followed *Overmyer* in holding that on the undisputed facts before it, it could be determined that a knowing, voluntary and intelligent waiver of due process was made. In *Sonoma*, *supra*, however, the California Supreme Court held that its State's cognovit scheme was unconstitutional because it did not provide for some showing to determine whether the debtor had made a knowing, voluntary and intelligent waiver of due process before entry of judgment (*i.e.* whether the waiver was effective).

The New York Court of Appeals in this case departed from both the Third Circuit and the California Supreme Court in finding on disputed facts that an effective waiver of due process was made and that an evidentiary hearing to determine the effectiveness of the alleged waiver was unnecessary, thereby further warranting this Court's review.

In *Overmyer*, *supra*, this Court was presented with the following undisputed facts: Overmyer, a large multi-national corporation with extensive legal representation, entered into a contract pursuant to which Frick was to perform certain work, for which Overmyer would pay in installments. Overmyer fell behind in its payments and Frick stopped its work and filed various mechanic's liens for the arrearage. As part of a settlement of this initial dispute, Overmyer executed a note (which did not contain a cognovit provision) in favor of Frick for a portion of the

arrearage, which was to be paid in installments. Subsequently, after Frick completed its work to Overmyer's satisfaction, Overmyer asked for additional time to make its payments under the note, and that Frick release its mechanic's liens. 405 U.S. at p. 179 - 180, 92 S.Ct. at p. 779.

Negotiations between the parties then ensued which resulted in the following agreement: Overmyer agreed to execute mortgages to Frick, and a new note *containing a cognovit provision*. In consideration for the cognovit provision, Overmyer got an extra year to make its payments, resulting in a reduction in its monthly payments by more than half, Overmyer's interest rate was reduced by one-half of a point, and Frick agreed to release its mechanic's liens. The cognovit provision executed by Overmyer allowed the holder of the note to designate an attorney to confess judgment against Overmyer for the principal of the note plus interest only in a Court in Ohio, and only in the event of a default by Overmyer and if said default lasted for fifteen days. 405 U.S. at p. 180, 92 S.Ct. at p. 780.

Subsequently, Overmyer again defaulted under the new note, and Frick entered judgment against Overmyer pursuant to the cognovit provision without prior notice to Overmyer of entry of the judgment. Importantly Overmyer did not dispute that it waived due process: it merely contended that due process could not be waived.

In holding that in the situation described above, Overmyer had *knowingly, voluntarily* and *intelligently* waived

its due process rights, the Court noted Frick's fulfillment of the initial contract, Overmyer's repeated delinquencies, Overmyer's representation by counsel and the specific consideration obtained by Overmyer for the execution of the cognovit provision:

> "Frick completed its work and Overmyer accepted the work as satisfactory. Thereafter Overmyer again asked for relief. At this time counsel for each side participated in the negotiations. The first note was replaced by the second. The latter contained the confession of judgment provision Overmyer *now finds* so offensive. However, in exchange for that provision and for its execution of the second mortgages, Overmyer received benefit and consideration in the form of (a) Frick's release of the three mechanic's liens, (b) reduction in the amount of the monthly payment, (c) further time in which the total amount was to be paid, and (d) reduction of a half point in the interest rate." 405 U.S. at p. 183, 92 S.Ct. at p. 781.

This Court held, after reiterating that the right to due process may be waived provided there is a knowing, voluntary and intelligent waiver, that in light of Overmyer's huge size and sophistication, in light of the extensive consideration obtained by Overmyer for signing the cognovit provision and in light of the fact that Overmyer does not and could not, contend that it was not aware of the significance and inclusion of the cognovit provision, Overmyer did on the undisputed facts before the Court, knowingly, voluntarily and intelligently waive its due process rights:

"Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceeding stated, it has built many warehouses in many states and has been party to 'tens of thousands of contracts with many contractors.' *This is not a case of unequal bargaining power or overreaching.* The Overmyer-Frick agreement, from the start, was not a contract of adhesion. There was no refusal on Frick's part to deal with Overmyer unless Overmyer agreed to a cognovit. The initial contract between the two corporations contained no confession-of-judgment clause. When, later, the first installment note from Overmyer came into being, it too, contained no provision of that kind. It was only after Frick's work was completed and accepted by Overmyer, and when Overmyer again became delinquent in its payments on the matured claim and asked for further relief, that the second note containing the clause was executed."

"*Overmyer does not contend here that it or its counsel was not aware of the significance of the note and of the cognovit provision.* Indeed, it could not do so in light of the facts. Frick had suggested the provision in October 1966, but the first note, readjusting the process payments, was executed without it. It appeared in the second note *delivered by Overmyer's own counsel in return for substantial benefits and consideration to Overmyer.* Particularly important, it would seem, was the release of Frick's mechanic's liens, but there were, in addition, the monetary relief as to amount, time and interest rate." 405 U.S. at p. 186, 92 S.Ct. at pp. 782-3. (Italics added)

The Court carefully cautioned in its concluding discussion the following:

> "Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognovit provision, other legal consequences may ensue." 405 U.S. at p. 188, 92 S.Ct. at p. 783.

Thus, in the above undisputed factual situation, where the signor of the cognovit provision was a large multi-national corporation, with vast legal representation, fully aware of the implications of the cognovit provision, and the cognovit provision was executed to settle an existing dispute, was heavily negotiated and for which was received extensive consideration, this Court found that it was unquestionable that an effective waiver of due process was made, and that the cognovit judgment was constitutional.

This Court's holding in *Overmyer* was followed by the Third Circuit in *FRG, supra*. In *FRG*, the Third Circuit was presented with a case in which FRG, Inc. and another company, in settlement of a lawsuit brought by one Bruce Manley against FRG, gave Manley a promissory note for $100,000.00 which contained a cognovit provision. FRG defaulted in its installments payments under the note, and Manley entered judgment in Pennsylvania against FRG pursuant to the cognovit provision without prior notice to FRG.

The Third Circuit held that this Pennsylvania cognovit judgment was constitutional, based upon its finding that, upon the undisputed facts presented, it was clear that

FRG knowingly, voluntarily and intelligently waived its right to due process.

Specifically, the Court found that because the debtors were substantial business entities, with sophisticated principals, who were knowledgeable in business matters, and that the confession of judgment clause was negotiated and specifically agreed upon in a commercial context in settlement of major litigation between parties represented by counsel, that FRG unequivocally knowingly, voluntarily and intelligently waived its rights to due process. The Third Circuit began it recitation of the facts by stating that "*The basic facts are not in dispute*" (919 F.2d at p. 852 [emphasis added]), and shortly thereafter in its decision, specifically noted that

> "The debtors' counsel specifically agreed to this confession of judgment provision and helped to draft it." 919 F.2d at p. 852.

Then, after stating that "In *Overmyer*, the debtor was a substantial corporation with principals fully aware of the impact of the confession of judgment clause [citation omitted]," 919 F.2d at p. 856, the Court concluded that

> "This case is much more like *Overmyer* than *Souders* [in which the Bankruptcy Court for the Eastern District of Pennsylvania held Pennsylvania cognovit judgments to be *per se* unconstitutional], as the debtors here seem to be business entities with sophisticated principals, knowledgeable in business matters. Furthermore, the confession of judgment clause here was negotiated and specifically agreed upon in a commercial context in settlement of major litigation between parties

represented by counsel." 919 F.2d at p. 857.

Thus, as the United States Supreme Court found in *Overmyer, supra,* the Third Circuit found in *FRG, supra,* that where the undisputed facts clearly indicate a knowing, voluntary and intelligent waiver of due process rights, then the cognovit judgment may be constitutional.

The New York Court of Appeals in this case, although purporting to rely upon the *Overmyer, supra,* holding, departed from both the Supreme Court and the Third Circuit by relying on "substantial evidence of waiver" rather than on undisputed facts of waiver to find that Petitioners knowingly, voluntarily and intelligently waived their due process rights, and that therefore a hearing to determine the effectiveness of the alleged waiver was not necessary.

Specifically, the Court of Appeals stated the following:

> "We are left then with the Supreme Court's conclusion that 'due process rights to notice and hearing prior to a civil judgment are subject to waiver.' (*Overmyer*, 405 US at 185, *supra*.) All that remains is to apply the waiver analysis in the present case to determine whether defendants voluntarily, knowingly and intelligently waived those rights. We conclude that they did waive those rights as a matter of law.
>
> Defendants were sophisticated parties involved in an arms-length commercial transaction--the transfer of a parcel of land for development as a shopping mall (*see, In re FRG, Inc.*, 919 F.2d 850, 857 [3d

Cir.]). The purchase price of the land alone was well in excess of one million dollars, indicating the magnitude of the project. Furthermore, the parties were represented by counsel in negotiating the terms of the agreement. Defendant Aronow claims not to have had counsel--a fact disputed by plaintiffs--but Aronow himself is an attorney.

Defendants also claim that they received no consideration for the cognovit provision, citing the Supreme Court's observation in *Overmyer* that the creditors in that case had made specific concessions in order to obtain the confession of judgment clause. In fact, the present case resembles *Overmyer* in this respect: *defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant. Clearly, that security device was given in exchange for the extended payment schedule.*

Finally, *defendants argue that, unlike the obligors in Overmyer, they were unaware of the cognovit clause*, which they claim was "buried" in the bond and warrant. In *Overmyer*, the Supreme Court noted that the obligor did not contend that it was unaware of the cognovit provision and that '[i]ndeed it could not do so in light of the facts.' (405 US at 186). The facts before us likewise belie defendants' assertion that they were unaware of the cognovit provision. The bond and warrant is a three-page document, with the cognovit clause the only provision on the last page, several lines above defendants' signatures. The bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse *their legal obligation or overcome the substantial evidence of waiver (see, Matzger v. Aetna Ins. Co.*, 227 NY 411, 416).

> As the Supreme Court noted, 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue.' (*Overmyer*, 405 US at 188). By contrast, the contract here was not one of adhesion, but rather represented a bargain struck between sophisticated commercial parties. It is clear that defendants made a voluntary, knowing and intelligent waiver of their right to notice and an opportunity to be heard, and should be held to the consequences of their conduct [emphasis added]."

The alleged facts relied upon by the New York Court of Appeals above are either disputed facts or presumptions. The Court of Appeals finding that Petitioners were "sophisticated parties" is a mere presumption. The Court's finding that Petitioners "were represented by counsel in negotiating the terms of the agreement" is a fact disputed by Petitioners.[2] The Court's factual finding that Petitioners received consideration for the cognovit (in addition to being an impermissible fact finding function of the Court as set forth below) is hotly disputed by Petitioners (RA 321 - 323). Finally, despite the fact that the Court of Appeals acknowledges that Petitioners dispute the fact that they were aware of the cognovit provision, the Court nevertheless held that

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[2] Although Petitioner Aronow admittedly is an attorney, he is a New York attorney, not familiar with cognovit judgments or Pennsylvania procedure. Furthermore, he was a principal in the transaction and not acting in the capacity of an attorney representing a client.

> "The bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse *their legal obligation or overcome the substantial evidence of waiver (see, Metzger v. Aetna Ins. Co.*, 227 NY 411, 416) [emphasis added]."

In fact, the New York Court of Appeals made findings of fact not supported by the Record in violation of Article 6, Section 3 of the New York State Constitution. Article 6, Section 3 of the New York State Constitution provides the following:

> "§ 3. [Jurisdiction of court of appeals]
>
> > a. The jurisdiction of the court of appeals shall be limited to the review of questions of law..."

In spite of this constitutional requirement, the Court of Appeals in this case made a finding of fact which, in addition to being contrary to the New York State Constitution, was incorrect. Specifically, the Court of Appeals found the following:

> "Defendants also claim that they received no consideration for the cognovit provision, citing the Supreme Court's observation in *Overmyer* that the creditors in that case had made specific concessions in order to obtain the confession of judgment clause. In fact, the present case resembles *Overmyer* in this respect: defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant. Clearly, that security device was given in exchange for the

extended payment schedule."

The finding of fact made by the Court of Appeals--that "defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant"--is clearly not permitted by the New York State Constitution.

In addition, this finding of fact made by the Court of Appeals is not supported by the Record. On the contrary, it was Respondents who requested that Petitioners close prior to the obtaining of approvals so that Respondents could obtain some cash in order to, supposedly, obtain the approvals, and it was due to this request by Respondents that the Bond and Warrant were executed.

Therefore, the Court of Appeals erred both by making a finding of fact and by making an erroneous finding of fact.

Thus, the Court of Appeals re-wrote the rule on the constitutionality of cognovit judgments. The rule according to this Court in *Overmyer, supra*, and followed by the Third Circuit in *FRG, supra,* is that cognovit judgments meet Constitutional muster only when there are undisputed facts which unquestionably show a knowing, voluntary and intelligent waiver of due process. The rule according to the New York Court of Appeals in this case, however, is that the judgment debtor (Petitioners herein) must "overcome the *substantial evidence* of waiver," "substantial

evidence" based upon presumptions and disputed facts. This goes contrary not only to the holding at this Court in *Overmyer, supra,* but also to the principal reiterated by this Court in *Fuentes v. Shevin,* 407 U.S. 67 (1972). In *Fuentes*, this Court stated that "[W]e do not presume acquiescence in the loss of fundamental rights...[i]ndeed in the civil no less than the criminal area, courts indulge in every reasonable presumption against waiver." 407 U.S. at 94, footnote 31.

This case, therefore, merits this Court's review to rectify this departure by the New York Court of Appeals in this case from the Supreme Court of the United States and followed by the Third Circuit.

This case merits this Court's review likewise to resolve the conflict between the New York Court of Appeals in this case and the decision of the California Supreme Court in *Isbell v. County of Sonoma, supra.* In *Sonoma,* the California Supreme Court held that the California confession of judgment statute was unconstitutional because it did not provide for some showing prior to entry of judgment to determine whether the debtor knowingly, voluntarily and intelligently waived his due process right. Specifically, the Court stated the following:

> "We shall explain that a signed confession of judgment is not adequate proof that the debtor has validly waived his due process rights; rather than emerging from negotiations between knowledgeable bargainers, such confessions are most often executed by debtors who have little understanding of the significance of their waiver

> and little choice in the matter. Because the California statute provides insufficient safeguards to assure that the debtor in fact executed a voluntary, knowing and intelligent waiver, and because the debtor's opportunity to seek post-judgment relief does not cure the unconstitutionality of a judgment entered without a valid waiver, we conclude that the confession of judgment procedures established in sections 1132 through 1134 violates the due process clause of the Fourteenth Amendment." 577 P.2d at pp. 189-190.

As noted above in *Sonoma, supra,* the California Supreme Court was concerned with the "meaningful time and manner" aspect of due process. It clearly demonstrated that the failure of it's cognovit scheme to provide some evidence of waiver other than the debtor's signature on the confession of judgment clause was required by due process. That Court relied on *Fuentes v. Shevin, supra,* which required a clear waiver before the state may seize property upon the application of another. The New York Court of Appeals failed to specifically address this point which was raised below. Is is an important consideration because it is a fundamental axiom to due process that a person is entitled to notice and an opportunity for a hearing before the state may enter final judgment.

The decision of the Court of Appeals in this case directly conflicts with the decision of the California Supreme Court in *Sonoma,* in that the New York State Court of Appeals is willing to rely upon "substantial evidence of waiver", based upon disputed facts and presumptions, in contrast to the California Supreme Court

which held that there must be some showing to determine whether a waiver was actually effected.[3] On this basis, as well, the within case merits this Court's review.

The New York Court of Appeals and California Supreme Court likewise differ in their interpretation of the holding of *Overmyer*. In *Sonoma, supra*, the California Supreme Court held that the California confession of judgment scheme was *per se* unconstitutional. In so doing, the California Supreme Court noted that there were significant distinctions between the California confession of judgment scheme and the Ohio confession of judgment scheme involved in *Overmyer, supra*. Nevertheless, the California Supreme Court stated the following with respect to *Overmyer, supra:*

> "...more significantly, the *Overmyer* decision nowhere addresses the issue, crucial to the present case, whether the Ohio statutes established a constitutionally adequate procedure for assuring that a valid waiver of constitutional rights had occurred. In *Overmyer* the judgment debtor did not attack the adequacy of the record, but instead broadly claimed that an individual could never validly waive all rights to notice and hearing

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[3] This is not unlike numerous other federal and state courts which have likewise held that there must be a pre-entry hearing to determine the effectiveness of an alleged waiver of due process rights. *See, e.g., Money Management, Inc. v. Vetere*, 436 N.Y.S.2d 158 (N.Y. City Civ. Ct. 1981); *Osmond v. Spence*, 327 F.Supp. 1349, remanded, 405 U.S. 971, 92 S.Ct. 1189, 31 L.Ed.2d 245, 359 F.Supp. 124 (D.C.Del. 1972); *Scott v. Danaher*, 343 F.Supp. 1272 (D.C. Ill. 1972); *Virgin Islands Nat'l Bank v. Tropical Ventures, Inc.*, 358 F.Supp. 1203 (D. Virgin Islands 1973); *In Re Souders*, 75 B.R. 427 (Bkrtcy.E.D.Pa. 1987).

> through a confession of judgment agreement. The *Overmiyer* decision went no further than to reject the broad proposition and to hold on the facts before it that D.H. Overmyer Co...had 'voluntarily, intelligently and knowingly' waived its constitutional rights [citations omitted].
>
> "Since it is axiomatic that 'cases are not authority for the propositions not considered therein' [citation omitted], we conclude that *Overmyer* did not resolve that a confession of judgment procedure which requires the entry of judgment without a sufficient showing of a valid waiver is consonant with due process....*Overmyer,* therefore does not conflict with our conclusion that the California confession of judgment procedure is constitutionally infirm." 577 P.2d at p. 195."

Thus, it is clear from the above that the California Supreme Court construed this Court's decision in *Overmyer* as having little or no precedential value. The California Supreme also construed *Overmyer* as not preventing the Court from holding that California's cognovit scheme was unconstitutional because it did not require a sufficient showing of a knowing, voluntary and intelligent waiver of due process prior to entry of judgment by a clerk.

The New York Court of Appeals, on the other hand, interpreted *Overmyer* as having great precedential value, and as standing for the proposition that where there is "substantial evidence of waiver *(see, Metzger v. Aetna Ins. Co.,* 227 NY 411, 416)", no hearing is required.

Thus, this case merits review by this Court to resolve which interpretation of *Overmyer* is the correct one.

In sum, the New York Court of Appeals in this case relied upon disputed facts and presumptions to find that Petitioners had knowingly, voluntarily and intelligently waived their due process rights. The decision of the New York Court of Appeals departed from this Court's holding in *Overmyer, supra,* that such a finding can only be made on undisputed, unequivocal facts. For this reason, and to correct the violation of Petitioners' due process rights, this case merits review by this Court.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted.

Dated: New York, New York
May 26, 1992

Respectfully submitted,

ALLEN C. COHEN
Attorney for Petitioners
Oakwood Plaza Shopping Center, Inc.
Joseph M. Aronow and
Anthony Galioto

No. 91 -

In The

Supreme Court of the United States

October Term, 1991

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

-against-

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

APPENDIX

SW

St. Louis & Westervelt, Inc. (3292)

APPENDIX A - OPINION AND ORDER OF AFFIRMANCE OF NEW YORK STATE COURT OF APPEALS, DATED DECEMBER 23, 1991 (78 N.Y.2d 572) [PAGES 1a - 13a]

State of New York
Court of Appeals

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1 No. 257
Leonard S. Fiore, Sr., et al.,

Respondents,

v.

Oakwood Plaza Shopping
Center, Inc., et al.,

Appellants.

Allen C. Cohen, for appellants.
Roy A. Powell, for respondents.

KAYE, J.:

[1] Judgments by confession, recognized both as "the loosest way of binding a man's property that ever was devised in any civilized country" *(Alderman v Diament,* 7 NJL 197, 198) and as devices that "serve a proper and useful purpose in the commercial world" *(Overmyer Co. v Frick Co.,* 405 US 174, 188), in this State have been strictly limited by the Legislature (*see,* CPLR 3218). The present case calls upon us to determine whether a Pennsylvania cognovit judgment,

APPENDIX A
[Opinion and Order - NYCA (1991)]

obtained under that State's laws, should be given full faith and credit here (*see*, US Const, art IV, § 1; 28 USC § 1738). Given the procedures followed in Pennsylvania, we agree with the trial court and the Appellate Division that the Pennsylvania judgment may be enforced against defendant-appellants in New York.

I.

In July 1986, plaintiffs contracted to sell a 14.8 acre parcel located in Patton Township, Centre County, Pennsylvania to State College Development Company, predecessor in interest to defendant Oakwood Plaza Shopping Center. Defendants Joseph Aronow and Anthony Galioto are principals in Oakwood. Under the agreement, the purchase price was to be determined by the number of square feet approved by the local authorities for use as retail sales space. Initially, the full purchase price was to be paid at closing--to occur no later than March 1987.

At defendants' request, a rider was later executed that changed the payment terms: $600,000 to be paid at closing, the remainder secured by a purchase money mortgage and note. Closing took place on December 23, 1986, at which time plaintiffs delivered the deed to the parcel and defendants paid $700,000 toward the purchase price. Oakwood executed a $1.1 million purchase money mortgage. Additionally, Oakwood, as well as Aronow and Galioto individually, executed a "bond and warrant" obligating them to pay $1.1 million with interest at 9% per annum. The bond contained a "warrant of attorney" through which defendants

authorized plaintiffs' attorney to confess judgment against them in the amount of $1.1 million.

Defendants failed to make the required payments. On September 9, 1988, in the Pennsylvania Court of Common Pleas, plaintiffs filed a complaint in confession of judgment as well as a praecipe to enter judgment against defendants (Pa Rules Civ Pro, rule 2951). On the same day, the prothonotary entered final judgment against defendants in the amount of $1,216,145 and sent them a notice of entry of final judgment and a copy of the complaint. A second judgment--in the amount of $1,287,713--was obtained against defendant Oakwood on the purchase money mortgage after Oakwood failed to appear and defend the action.

In November 1988, plaintiffs served a demand for discovery in aid of execution upon defendants. After defendants failed to respond, plaintiffs filed a motion in the Pennsylvania Court of Common Pleas to compel discovery and impose sanctions which the court, in January 1989, granted.

Defendants, in May 1989, filed a petition to open or strike the judgment (Pa Rules Civ Pro, rule 2959). The Court of Common Pleas, after a hearing, denied the petition, concluding that the petition was both untimely and raised no meritorious defense. Three months later, in September 1989, defendants filed an untimely appeal of that decision which was later withdrawn. In October 1989, the Pennsylvania court, after a hearing, held defendants in criminal contempt for failure to comply with the court's order directing them to respond to plaintiffs' discovery requests. Substantial monetary

penalties were imposed.

Frustrated in their enforcement efforts in Pennsylvania, plaintiffs commenced the present New York action in January 1989 by summons and notice of motion for summary judgment in lieu of complaint (*see*, CPLR 3213). The action, originally framed as one "upon an instrument for the payment of money only" (based on the bond and warrant), was later converted into an action upon the two Pennsylvania judgments. Defendants filed a cross motion to dismiss for legal insufficiency (CPLR 3211[a][7]).

Supreme Court granted plaintiffs' motion for summary judgment, concluding that the Pennsylvania court had personal jurisdiction over defendants, that due process requirements had been satisfied, and that the judgments were valid and conclusive in the forum State. As a result, the court concluded, the Pennsylvania judgments were entitled to full faith and credit. Finally, the court denied defendants' cross motion, holding that it was precluded from looking beyond the jurisdictional aspects of the Pennsylvania proceedings.

The Appellate Division affirmed, agreeing that the Pennsylvania cognovit judgment on the bond and warrant should be accorded full faith and credit. The court concluded that under the circumstances "where the parties were engaged in an arms length business transaction, were represented by counsel, and the defendant was on actual notice of the entry of the judgment and, in fact, sought to challenge same prior to execution, it cannot be said that the cognovit judgment amounted to a deprivation of property rights without due process." (164 AD2d 737, 742).

On this appeal, defendants again attempt to argue the merits of the Pennsylvania judgment. In addition, defendants argue that cognovit judgments as a matter of law are not entitled to full faith and credit in this State, citing this Court's decision in *Atlas Credit Corp. v Ezrine* (25 NY2d 219). Plaintiffs respond that United States Supreme Court decisions rendered after *Atlas* have made clear that cognovit judgments are not *per se* unconstitutional. Rather, plaintiffs assert, a case-by-case analysis is required to determine whether defendants voluntarily, knowingly and intelligently waived their rights to notice and an opportunity to be heard. The facts clearly demonstrate that such a valid waiver was effected, according to plaintiffs, and therefore the Pennsylvania judgment should be afforded full faith and credit. Agreeing with plaintiffs' arguments, we now affirm the Appellate Division order.

II.

[2] As a matter of full faith and credit, review by the courts of this State is limited to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations *(Parker v Hoefer,* 2 NY2d 612, *cert. denied* 355 US 833; *see also, Augusta Lbr. & Supply v Sabbeth Corp.,* 101 AD2d 846; 4 Weinstein-Korn-Miller, NY Civ Prac § 3213.04). Thus, inquiry into the merits of the underlying dispute is foreclosed; the facts have bearing only in the limited context of our jurisdictional review *(Parker v Hoefer, supra,* at 616-617). Moreover, although this is a confessed judgment, defendants have been offered, and have

availed themselves of, a full and fair opportunity to argue the merits in the Pennsylvania courts.

The cognovit is a contractual provision, employed as a security device, whereby the obligor consents in advance to the creditor's obtaining a judgment without notice or hearing (*see, Overmyer Co. v Frick Co.*, 405 US, at 176, *supra*). In the present case, the cognovit contained a "warrant of attorney," a provision that empowers any attorney to enter the obligor's appearance in any court of record and to waive--on the obligor's behalf--process and consent to the entry of judgment (*Atlas Credit Corp. v Ezrine*, 25 NY2d, at 225, *supra*).

In *Atlas*, this Court held that the Pennsylvania cognovit judgment in issue was not entitled to full faith and credit. First, we concluded that the cognovit "judgment" was a judgment in name only, having none of the "minimums of judicial process" usually associated with that term. For that reason alone, the cognovit judgment was not entitled to full faith and credit (25 NY2d at 229-230, *supra*). Second, as recognition of the judgment was not constitutionally mandated, we determined that enforcing the cognovit judgment would be repugnant to New York policy (25 NY2d, at 230). Finally, we held that even assuming the cognovit could qualify as a judgment for full faith and credit purposes, the Pennsylvania judgment was not enforceable in this State because cognovit judgments that provide for entry of a judgment by confession anywhere in the world without notice are *per se* unconstitutional (25 NY2d, at 231-232).

In *Atlas*, this Court noted that United States Supreme

Court precedent considering cognovit judgments stood only for the proposition that the terms of a warrant of attorney should be strictly construed (25 NY2d, at 227, *supra*). The Supreme Court had not yet spoken on the constitutionally of such judgments. Several years after *Atlas*--in the companion cases *Overmyer Co. v Frick Co.* (405 US 174, *supra*) and *Swarb v Lennox* (405 US 191)--the United States Supreme Court did have the opportunity to consider whether cognovit judgments were *per se* unconstitutional.

In *Overmyer*, the Court ruled that Ohio's cognovit procedure was not *per se* unconstitutional (405 US, at 187, *supra*). Instead, the Court directed attention to the effectiveness of the obligor's waiver of due process rights, a necessarily fact-specific inquiry, concluding from the facts that the obligor there had effectively waived those rights *(id.)*. First, the Court assumed that the proper standard for determining the effectiveness of the waiver was the same as in criminal proceedings, "that is, that it be voluntary, knowing, and intelligently made" (405 US, at 185). The Court emphasized that the obligors were sophisticated corporations, represented by counsel, involved in an arms-length commercial transaction. Furthermore, the cognovit clause was contained in a contract modification that had been effected after the obligor defaulted on its obligations and for which it received consideration. Thus, the Court concluded, the obligor in *Overmyer* had effectively waived its right to notice and a hearing.

Finally, the Court in *Overmyer* observed that the obligor was not--by execution of the cognovit clause--rendered defenseless (405 US, at 188, *supra*). Rather, under Ohio law

the obligor could seek to vacate the judgment --indeed, the obligor had in fact had a post-judgment hearing in an Ohio court. The concurrence emphasized the availability of post-judgment hearing as an avenue of relief for an obligor with a legitimate defense (405 US at 189-190 [Douglas, J., concurring]). [1]

In *Swarb*, the Supreme Court considered a constitutional challenge to the Pennsylvania cognovit judgment scheme, and rejected plaintiffs' argument that the procedure was invalid on its face. The Court, citing *Overmyer*, reiterated that "under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document signed had contained no cognovit provision." (405 US, at 200, *supra*).

We therefore consider the impact of *Overmyer* and *Swarb* on our earlier holding in *Atlas* that Pennsylvania cognovit judgments are not entitled to full faith and credit.

[3] It is evident that the conclusion reached in *Atlas* concerning the *per se* unconstitutionality of the Pennsylvania cognovit scheme is itself no longer valid in light of the subsequent Supreme Court decisions (*see, Money Mgt v Vetere*, 107 Misc2d 861, 863-864; *In re PCH Assocs.*, 122 Bankr 181, 194-195 [SDNY] [questioning the continued validity of the *Atlas* analysis in light of *Overmyer* and *Swarb*];

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[1] Justice Douglas contrasted the Ohio post-judgment procedure with the Pennsylvania procedure involved in *Swarb v Lennox* (405 US 191), which he found imposed a stiffer--and "undue"--burden of persuasion on the debtor (405 US, at 190, fn, supra). The Pennsylvania procedure was subsequently amended, and now places the same burden of persuasion on the debtor as was found in the Ohio scheme--sufficient evidence to raise a jury question (see, Pa Rules Civ Pro, rule 2959[e]).

see also, Siegel, NY Prac, § 300, at 430-431 [Prac 2d ed][same]). Cognovit judgments entered in other jurisdictions cannot automatically be denied full faith and credit; rather, enforceability must depend on the facts of each case. More particularly, it must be determined that the judgment debtor made a voluntary, knowing and intelligent waiver of the right to notice and an opportunity to be heard.

[4] In that *Overmyer* and *Swarb* did not raise full faith and credit issues, it is arguable that the determination in *Atlas* that cognovit judgments are not judgments in the ordinary sense of the word would bar enforcement of such judgments in this State. Even assuming the continued validity of this line of reasoning, however, we note that the Pennsylvania cognovit judgment scheme has been amended in several areas relevant to the concerns expressed in *Atlas* (*see*, Pa Rules of Civ Pro, rule 2951 *et seq.*). The main concern in *Atlas* was that the Pennsylvania cognovit procedure provided little in the way of judicial intervention, resembling more a "purely personal act." (25 NY2d, at 230, *supra*). In addition to amending the procedure for opening the cognovit judgment to reduce the burden on the petitioning judgment debtor--thereby facilitating access to a judicial determination of the merits of the underlying claim--the Pennsylvania statute now provides that notice of entry be mailed by the court clerk rather that the plaintiff's attorney (Pa Rules Civ Pro, rule 236). Judgments rendered pursuant to this procedure are therefore "judgments" for full faith and credit purposes.

Defendants make one additional threshold argument concerning the validity of the Pennsylvania judgment, claiming that in the "pre-dispute" context a hearing must be held to

determine waiver prior to the entry of judgment in the forum State (*see, Isbell v. County of Sonoma,* 21 Cal 3d 61, 145 Cal Rptr 368, 577 P2d 188, *cert denied* 439 US 996). The distinction, according to defendants, rest on the indicia of reliability present when the cognovit judgment is entered into following the development of a full-blown controversy. This argument is without merit.

[5] Rather than an artificial dichotomy based on the timing of the "dispute"--one that finds no support whatever--the need for a hearing should be determined on a case-by-case basis. A hearing at some stage would clearly be warranted where the record is insufficient to support a waiver determination (*see, In Re PCH Assocs,* 122 Bankr, at 193-194, *supra*). We cannot agree with defendants, however, that as a matter of law there must in every instance be a pre-judgment hearing to determine whether the debtor waived its right to notice and a pre-judgment hearing. [2]

Thus, there is no *per se* constitutional barrier to enforcement of Pennsylvania cognovit judgments.

III.

[1] We are left then with the Supreme Court's conclusion that "due process rights to notice and hearing

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[2] The California Supreme Court in *Isbell* was concerned with an entirely different procedure. That court--in concluding that a hearing prior to entry of judgment was required--contrasted the California scheme to the Ohio scheme involved in *Overmyer* by emphasizing that California provided for no notice of entry of judgment and several restricted the grounds for post-judgment attack (577 P2d 188, 195). As noted, the Pennsylvania scheme is identical to the Ohio scheme in these respects.

prior to a civil judgment are subject to waiver." (*Overmyer* Co. v Frick Co., 405 US, at 185, *supra.*) All that remains is to apply the waiver analysis in the present case to determine whether defendants voluntarily, knowingly and intelligently waived those rights. We conclude that they did waive those rights as a matter of law.

Defendants were sophisticated parties involved in an arms-length commercial transaction--the transfer of a parcel of land for development as a shopping mall (*see, In re FRG, Inc.* v Manley, 919 F2d 850, 857 [3d Cir]). The purchase price of the land alone was well in excess of $1 million, indicating the magnitude of the project. Furthermore, the parties were represented by counsel in negotiating the terms of the agreement. Defendant Aronow claims not to have had counsel--a fact disputed by plaintiffs--but Aronow himself is an attorney.

Defendants also claim that they received no consideration for the cognovit provision, citing the Supreme Court's observation in *Overmyer* that the creditors in that case had made specific concessions in order to obtain the confession of judgment clause. In fact, the present case resembles *Overmyer* in this respect: defendants sought modification of the payment terms--from a lump sum due at closing to a two-year payment schedule--and in return for this modification executed the bond and warrant. Clearly, that security device was given in exchange for the extended payment schedule.

Finally, defendants argue that, unlike the obligors in *Overmyer,* they were unaware of the cognovit clause, which

they claim was "buried" in the bond and warrant. In *Overmyer*, the Supreme Court noted that the obligor did not contend that it was unaware of the cognovit provision and that "[i]ndeed it could not do so in the light of the facts." (405 US, at 186, *supra*). The facts before us likewise belie defendants' assertion that they were unaware of the cognovit provision. The bond and warrant is a three-page document, with the cognovit clause the only provision on the last page, several lines above defendants' signatures. The bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse their legal obligation or overcome the substantial evidence of waiver (*see, Metzger v Aetna Ins. Co.*, 227 NY 411, 416).

As the Supreme Court noted, "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." (*Overmyer* Co. v Frick Co., 405 US, at 188n, *supra*.) By contrast, the contract here was not one of adhesion, but rather represented a bargain struck between sophisticated commercial parties. It is clear that defendants made a voluntary, knowing and intelligent waiver of their right to notice and an opportunity to be heard, and should be held to the consequences of their conduct.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur.

Order affirmed, with costs.

APPENDIX B - DECISION OF THE NEW YORK STATE COURT OF APPEALS, DENYING REARGUEMNT, DATED FEBRUARY 25, 1992

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION February 25, 1992

Mo. No. 124
Leonard S. Fiore, Sr., et al.,

Respondents,

v.

Oakwood Plaza Shopping
Center, Inc., et al.,

Appellants.

Motion for reargument denied with one hundred dollars costs and necessary reproduction disbursements.

APPENDIX C - DECISION AND ORDER OF AFFIRMANCE OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE STATE OF NEW YORK, DATED JANUARY 31, 1991 (164 A. D. 2d 737) [PAGES 15a - 23a]

SUPREME COURT, APPELLATE DIVISION
First Department, October 1990

Theodore R. Kupferman, J.P.
Sidney H. Asch
George Bundy Smith
Israel Rubin, JJ.

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Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard F. Fiore, Harry K. Sickler and Thomas C. Large, d/b/a FL&S Associates,

Plaintiffs-Respondents,

against 41213

Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow and Anthony Galioto,

Defendants-Appellants.

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Appeal by the defendants-appellants from an order of the Supreme Court, New York County (Beatrice Shainswit, J.), entered September 8, 1989 which, *inter alia*, granted plaintiffs' motion for summary judgment in lieu of complaint, and denied the cross-motion of defendant Aronow to dismiss the action.

Donald S. Snider, of counsel (Harry B. Frank and Harvey B. Baum with him on the brief; Frank, Aronow & Baum, P.C. and Fink Weinberger, P.C., attorneys) for defendants-appellants

Roy A. Powell, of counsel (Stuart M. Steinberg with him on the brief; Steinberg & Fineo and Jones, Day, Reavis & Pogue, attorneys) for plaintiffs-respondents.

APPENDIX C
[Decision And Order - A. D. 1 NY (1991)]

GEORGE BUNDY SMITH, J.

The issue presented is whether summary judgment in lieu of complaint is appropriate based upon a cognovit judgment secured in Pennsylvania.

By summons and notice of motion for summary judgment in lieu of complaint, plaintiffs, in January 1989, commenced this action for payment of money only alleged to be due and owing under a bond and warrant. Representing a second mortgage, the bond and warrant was entered into in conjunction with an agreement of sale and purchase-money mortgage related to the purchase by defendants from plaintiffs of 14.8 acres of land in Patton Township, Centre County, Pennsylvania. The property was to be developed as a shopping center. In reply papers, plaintiffs set forth that on December 5, 1988 and September 9, 1988, they had obtained cognovit judgments in the Pennsylvania Court of Common Pleas against Oakwood in the amount of $1,287,713.88 and against all the defendants in the amount of $1,216,145 based upon the purchase money mortgage and bond and warrant, respectively. Plaintiffs, therefore, requested summary judgment upon the Pennsylvania judgments.

Citing *Atlas Credit Corporation v Ezrine*, (25 NY2d 219 [1969]), the IAS court granted summary judgment for plaintiffs based upon the two judgments. It concluded that *in personam* jurisdiction had been obtained over the

individual defendants under the Pennsylvania long arm statute (42 Pa Cons Stat §§ 5301, 5322) and that the judgments were conclusive and, therefore, entitled to full faith and credit. The court denied defendants' cross-motion to dismiss, pursuant to CPLR 3211 (a) (7), stating that it was precluded from considering the merits of the Pennsylvania actions.

We affirm the IAS court's grant of summary judgment.

We first note that the "Bond and Warrant," insofar as it incorporated other documents related to the parties' real estate transaction and failed to set forth a liquidated sum, did not qualify as an "instrument for the payment of money only." (CPLR 3213.) While plaintiffs moved for summary judgment in lieu of complaint on a note for $1.1 million plus interest, the addendum to the bond and warrant, annexed to defendants' papers in opposition, provides in paragraph "4" that the principal amount due plaintiffs depended upon a calculation of the interior square footage defendants would be permitted by local authorities to build. Additionally, the agreement of sale, which survived the closing, provided for offsets against the note in the event of plaintiffs' default. The papers raise an issue of fact as to whether plaintiffs breached their contractual obligations under the agreement of sale.

There was no bar to the IAS court's consideration of plaintiffs' claim for full faith and credit enforcement of a foreign judgment upon the bond and warrant. (CPLR 2001; *see, Siegel,* Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:3, 70). CPLR 3213 authorizes a motion for summary judgment in lieu of complaint in an action "upon an instrument for the payment of money only or upon any judgment". That plaintiffs sought judgment on this note was set forth in its notice of motion made pursuant to CPLR 3213. While plaintiffs for the first time in their reply claimed reliance upon the Pennsylvania judgments, defendants availed themselves of an opportunity to oppose the claim in their surreply. Hence, consideration of plaintiffs' full faith and credit claim resulted in no prejudice to a substantial right of defendants. (CPLR 2001; *Russell v Trask Co.,* 125 AD2d 136 [3rd Dept. 1987]; *Fletcher v. Greiner,* 73 AD2d 591 [2nd Dept. 1979].)

Similarily, the IAS court correctly concluded that upon its consideration of the facts, the Pennsylvania cognovit judgment on the Bond and Warrant should be accorded full faith and credit. *(Atlas Credit Corp. v Ezrine, supra; Mallan v Samowich,* 94 AD2d 249, 252-253 [1st Dept 1983]; *mot to amend order granted* 97 AD2d 364 [1983]; *North Cent. Pa. Regional Planning & Dev. Commn. v Woodworth,* 154 AD2d 913 [4th Dept. 1989].)

The individual plaintiffs are all residents of Pennsylvania. Plaintiff FL&S Associates is a partnership consisting of the individual plaintiffs and having its principal place of business in Pennsylvania. While Oakwood is a Pennsylvania corporation, defendants Aronow and Galoto, who are secretary and president of Oakwood, respectively, are residents of New York.

By complaint in confession of judgment filed on September 9, 1988, in the Court of Common Pleas of Centre County, Pennsylvania, plaintiffs demanded entry of judgment as authorized by the bond and warrant, in the amount of $1.1 million plus attorney's fees and interest. Plaintiffs' counsel executed a confession of judgment on behalf of defendants and judgment was entered on that same day by the prothonotary of the court in favor of plaintiffs. (Pa Rules Civ Pro, rule 2951 [b], [c].) A notice of entry of judgment and a copy of the complaint in confession of judgment were apparently mailed by the prothonotary to defendants. On November 9, 1988, plaintiffs, by certified and first class mail, served defendants with a request for discovery in aid of execution of that judgment to which defendants did not respond. Copies of these mail receipts are part of the record. On January 6, 1989, plaintiffs filed a motion to compel discovery and for sanctions against defendants which was granted by the Pennsylvania court on January 26, 1989. On January 20, 1989, plaintiffs commenced the instant action in Supreme Court, New York County.

APPENDIX C
[Decision And Order - A. D. 1 NY (1991)]

In *Atlas Credit Corp. v Ezrine, (supra),* the Court of Appeals considered whether a Pennsylvania cognovit judgment, similar to the one presented herein, was entitled to full faith and credit. In *Atlas,* the court concluded that the plaintiff's motion for summary judgment enforcement of the Pennsylvania judgment was properly denied and dismissed the complaint with leave to replead. The Court of Appeals held that the procedure by which cognovit judgments were obtained was repugnant to New York's policy, since inherent in them was the lack of opportunity for notice and hearing prior to entry of judgment. Unlike confessions of judgment under CPLR 3218, the obligors, as a matter of contract and prior to any claimed default, authorize some unknown third party to confess judgment in their behalf. Judge Breitel, writing for the majority in *Atlas,* first noted that full faith and credit under Article IV, §1 of the US Constitution should extend to "judgments" which, by definition, are judicial proceedings or formal decisions rendered in a controversy in which both sides have been given notice and an opportunity to be heard. (25 NY2d, at 230.) By contrast, a proceeding to enter a cognovit judgment on a warrant of attorney is before a prothonotary, or clerk of the court, whose duties are purely ministerial. "The [cognovit] proceedings do not involve the exercise of discretion or judgment usually associated with judicial proceedings . . . [T]he *cognovit* judgment, while not itself a contract, is merely 'the act of the law, invoked by the parties, in executing [their] agreement' . . . [providing for] the court's inprimatur on a

purely personal act." (25 NY2d at 230.) The *Atlas* court found particularly abhorrent a provision in the note which authorized "any Attorney of any Court" to appear on behalf of the obligor and to confess judgment in any court of record within the United States of America, or elsewhere. (25 NY2d at 231.)

It is clear that the Pennsylvania procedure provides for the opportunity to vacate a cognovit judgment and that, to date, defendants have failed to do so. In *D. H. Overmyer Co. v Frick Co.* (405 US 174 [1972] and *Swarb v Lennox* (405 US 191 [1972], *reh denied* 405 US 1049 [1972]), the United States Supreme Court had occasion to consider the constitutionality of cognovit judgments obtained in Ohio and Pennsylvania. In *D. H. Overmyer and Swarb (supra),* companion cases, the Court rejected the contention that, on their face, the Ohio and Pennsylvania cognovit statutes were unconstitutional as violative of a debtor's Fourteenth Amendment due process rights. In *D. H. Overmyer,* the Supreme Court held that the facts before it indicated that Overmyer, a sophisticated corporation represented by counsel, had, for consideration, voluntarily and knowingly waived its rights to prejudgment notice and hearing (405 US, at 187). The holding in *D. H. Overmyer* was extended to individual consumers in *Swarb.* There the court affirmed a District Court finding, after hearing, that appellants, who were acting on behalf of a class of consumer debtors, had not sustained their burden of establishing lack of valid consents in the execution of

bonds and warrants, as to the entire class.

Under Pennsylvania Law, as amended in 1973, a debtor can petition the court to strike or to open a cognovit judgment, raising all defenses. (Pa Rules Civ Pro rule 2959 [e].) Here, on September 21, 1988, the day the cognovit judgment on the bond and warrant was entered, the prothonotary of the court notified defendants of the judgment. Plaintiffs submitted proof that on November 16, 1988, defendants received plaintiffs' request for discovery in aid of execution of the judgment. Receiving no response, plaintiffs successfully moved to the Pennsylvania Court of Common Pleas for an order compelling disclosure and sanctioning defendants. On May 10, 1989, defendants belatedly filed a petition in the Pennsylvania Court to open or strike the judgment. Oral arguments were held on the motion following which defendants' petition was denied. Defendants thereafter filed a notice of appeal of that order with the Pennsylvania Superior Court.

Under the circumstances herein, where the parties were engaged in an arms length business transaction, were represented by counsel, and the defendant was on actual notice of the entry of the judgment and, in fact, sought to challenge same prior to execution, it cannot be said that the cognovit judgment amounted to a deprivation of property rights without due process.

[Decision And Order - A. D. 1 NY (1991)]

Order of the Supreme Court, New York County (Beatrice Shainswit, J.) entered September 8, 1989, *inter alia*, granting plaintiffs' motion for summary judgment in lieu of complaint (CPLR 3213) and denying the cross-motion of defendant Joseph M. Aronow ("Aronow") for dismissal of the action (CPLR 3211 [a] [7]), affirmed, with costs.

Kuppferman, J.P., Asch and Rubin, J.J., concur.

Order, Supreme Court, New York County, entered September 8, 1989, unanimously affirmed, with costs.

APPENDIX D - DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE STATE OF NEW YORK, DENYING REARGUMENT, DATED MAY 9, 1991 [PAGES 24a - 25a]

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on May 9, 1991

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
George Bundy Smith
Israel Rubin, Justices

Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard F. Fiore, Harry K. Sickler and Thomas C. Large, d/b/a FL&S Associates,

Plaintiffs-Respondents,

- against - M-1100

Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow and Anthony Galioto,

Defendants-Appellants.

Defendants-appellants having moved for clarification and reargument of a decision and order of this Court (Appeal No. 41213) entered on January 31, 1991, or, in the alternative, modification of the order of the Supreme Court to stay execution of judgment pending resolution of appellants' counterclaims, and for other relief,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and hereby is denied in its entirety.

ENTER:

s/_____
Clerk

APPENDIX E - ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED AUGUST 3, 1989 [PAGES 26a - 29a]

PRESENT:
Hon. Beatrice Shainswit
Justice

AT I.A.S. PART 10 OF THE SUPREME COURT OF THE STATE OF NEW YORK, HELD IN AND FOR THE COUNTY OF NEW YORK, AT THE COUNTY COURT HOUSE THEREOF, ON THE 3rd DAY OF Aug. 1989.

----------x

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Plaintiffs,

-against-

Index No. 3094/89

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Defendants.

ORDER

----------x

[Order of The NYSC NY County (1989)]

Upon reading and filing the Plaintiffs Summons and Notice of Motion for Summary Judgment in Lieu of Complaint both dated the 20th day of January, 1989, the Affidavit of Harry K. Sickler, duly sworn to on the 19th day of January, 1989 and exhibit thereto in support of said Motion and proof of service thereof, the Affirmation of Robert W. Marguelies, Esq., attorney for the Defendant, Anthony Galiato, affirmed the 7th day of March, 1989, in Opposition to Plaintiffs' motion; and the Affidavit of the Defendant, Joseph M. Aronow, duly sworn to on the 20th day of March, 1989, in Opposition to Plaintiffs' motion; and the Defendant, Joseph M. Aronow's Notice of Cross-Motion to Dismiss the Plaintiffs' Complaint dated the 20th day of March, 1989; and the Affidavit of Defendant, Joseph M. Aronow, duly sworn to on the 20th day of March, 1989 in Support of said Cross-Motion; and the Affidavit of Ian Lowell Heller, Esq., attorney for the Defendant, Oakwood Plaza Shopping Center, Inc., dated the 21st day of March, 1989 in Opposition to Plaintiffs' motion; and the Affidavit of David Sweetland, duly sworn to on the 29th day of March, 1989 in further support of Plaintiffs' motion; and the Affidavit of Harry K. Sickler, duly sworn to on the 29th day of March, 1989 in further support of Plaintiff's motion; and the Supplemental Affidavit of the Defendant, Anthony Galioto, duly sworn to the 17th day of April, 1989, in Opposition to Plaintiffs' motion; and the Defendant, Joseph M. Aronow's Affidavit duly sworn to the 24th day of April, 1989 in Opposition to Plaintiffs' Motion: and this matter having come on for Argument before the Court, and after due deliberation having been had thereon, the Court having rendered its

APPENDIX E
[Order of The NYSC NY County (1989)]

Decision on the 19th day of June, 1989; hereto as Exhibit "A".

NOW, on Plaintiffs' motion and Defendant's cross-motion, it is further

ORDERED, that the Motion of the Plaintiffs for Summary Judgment in Lieu of Complaint is granted and the defendants' cross-motion is denied, and it is

ORDERED, that the Clerk enter judgment in favor of the Plaintiffs and against the Defendant, Oakwood Plaza Shopping Center, Inc. in the amount of ONE MILLION TWO HUNDRED EIGHTY SEVEN THOUSAND SEVEN HUNDRED THIRTEEN and 88/100 ($1,287,713.88) DOLLARS plus interest thereon from October 31, 1988 at 9% per annum, and it is further

ORDERED, that the Clerk enter judgment in favor of Plaintiffs and against the Defendants, Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow, and Anthony Galioto in the amount of ONE MILLION TWO HUNDRED SIXTEEN THOUSAND ONE HUNDRED FORTY FIVE ($1,216,145) DOLLARS plus interest thereon from August 20, 1988 at 9% per annum; and it is further

ORDERED, that the Counter-Claims of the Defendant, Oakwood Plaza Shopping Center, Inc., are severed and continued.

ENTER:

Beatrice Shainswit, Justice
Supreme Court, New York County

Law Offices of
STUART M. STEINBERG
1565 Franklin Avenue
Mineola, New York 11501
(516) 747-1136

JONES, DAY, REAVIS & POGUE, ESQS.
500 Grant Street
One Mellon Bank Center
Pittsburgh, Pa. 15119

FILED: September 8, 1989

COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX F - DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DATED JUNE 15, 1989 [PAGES 30a - 35a]

SUPREME COURT: NEW YORK COUNTY
I A S : PART 10

----------x

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Plaintiffs,

-against-

INDEX #3094/89-001
Cal. #6 - - 4/24/89

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Defendants.

----------x

SHAINSWIT, J.:

Plaintiffs move for an order, pursuant to CPLR 3213, granting summary judgment in lieu of complaint in the sum of $1,256,387 upon two judgments entered in the Court of Common Pleas, Centre County, Pennsylvania, December 5, 1988. Defendants cross-move for an order, pursuant to CPLR 3211 (a) (7), dismissing this action for legal insufficiency.

[Order of The NYSC, New York County (1989)]

This action arose in connection with defendants' purchase of 1.8 acres in Patton Township, Centre County, Pennsylvania. A Bond and Warrant was executed by all defendants in this action on December 23, 1986, obligating defendants in the amount of $1,100,000 plus interest. At the same time as the Bond and Warrant was executed, defendant Oakwood Plaza Shopping Center, Inc. gave a mortgage to plaintiffs in the amount of $1,100,000.

Having failed to comply with the mortgage payment schedule, Oakwood was served with a complaint in mortgage foreclosure. After Oakwood defaulted, plaintiffs served notice by certified mail that if no answer was filed, judgment would be entered. Oakwood thereafter failed to file an answer or other pleading. On December 5, 1988, the Pennsylvania court entered judgment in favor of plaintiffs and against Oakwood in the amount of $1,287,713.88, and notice of that judgment was served on Oakwood.

The second Pennsylvania judgment in question was commenced against defendants Oakwood, Aronow and Galioto by a complaint in confession of judgment dated September 9, 1988. Pursuant to the authority contained in a Warrant of Attorney, plaintiffs' attorney appeared for defendants and confessed judgment in favor of plaintiffs in the amount of $1,216,145.

With respect to the two Pennsylvania judgments, the notice and opportunity to be heard requirements mandated by Pennsylvania law and the due process clause of the Constitution have been met. Both actions were commenced by the filing of complaints. Additionally, notice of the confessed judgment, along with the complaint, was served on all defendants by the court. Defendant Galioto's argument that he received no notice of the Pennsylvania proceedings is conclusory, vague and unconvincing.

The judgments entered by the Court of Common Pleas of Centre County, Pennsylvania remain unsatisfied, and defendants Oakwood, Aronow and Galioto have failed to pay the judgments.

The judgments of sister states are entitled to full faith and credit so long as the rendering court had personal and subject matter jurisdiction. Such a judgment is entitled to full faith and credit in this state, and is only subject to collateral attack when the courts either lacked jurisdiction or there was fraud in the entry of the judgment (*see Williams v. North Carolina*, 317 U.S. 287).

In personam or personal jurisdiction may properly be exercised by a court in Pennsylvania, subject to a two-prong analysis under the Pennsylvania Long Arm Statute, 42 Pa. C.S.C. Sec. 5301 *et seq.* and under the minimum contact requirements of the due process clause.

As to defendant Oakwood, a Pennsylvania corporation, and defendants Aronow and Galioto, the court of Common Pleas of Centre County had jurisdiction. In light of defendants' admission of Oakwood's status as a Pennsylvania corporation, and Oakwood's transaction of business in Pennsylvania in connection with the acquisition of the intended development of the shopping center project, the Pennsylvania nexus with this defendant is clear.

As to Galioto and Aronow, their negotiations in their capacity as President and Secretary, respectively, of a Pennsylvania corporation in connection with the purchase of the Oakwood property, suffice under the Pennsylvania Long-Arm statute to afford the Court of Common Pleas jurisdiction over them.

The contacts with Pennsylvania were directed at residents of Pennsylvania and property located in Pennsylvania. The mortgage and Bond and Warrant were placed in escrow and subsequently delivered by defendants' counsel acting as escrow agent in Pennsylvania. All of the documents relating to the debt were delivered and recorded in Pennsylvania. Thus defendants' contacts with Pennsylvania exceed the minimum contact requirements of due process [*see Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)]

Defendants' cross-motion is addressed to the merits of the underlying Pennsylvania actions. Specifically,

defendants challenge the validity of the Pennsylvania confession of judgment procedures and ask this court to look beyond the jurisdictional aspects of these proceedings.

On a CPLR 3213 motion to enforce a sister state judgment, this court will not look to the underlying merits of a dispute already resolved in a sister state forum. This court will only consider arguments as to the absence of due process or lack of jurisdiction in the underlying action. Therefore, defendants' cross-motion addressed to the underlying issues in the Pennsylvania actions is denied.

Regarding the issue of the confession of judgment, Professor Siegel comments that:

> "* * * a confession of judgment not guilty of the cognovit's offenses may satisfy due process and, while not being allowed mere registration under CPLR 5401, nevertheless be entitled to full faith and credit and hence New York enforcement through other means, such a CPLR 3213 or a plenary action.
>
> The mere fact that a sister-state judgment was rendered 'by default in appearance, or by confession of judgment' does not mean that it is not entitled to full faith and credit. Default judgments rendered with jurisdiction are surely so entitled * * * and the same goes for confessed judgments taken pursuant to procedures that satisfy due process * * * *" (Siegel, Supplementary Practice Commentariles, CPLR § 5401, p. 136)

All confessions of judgment in New York, whatever

their source, "are always closely scrutinized * * * and in judging them a liberal attitude should be assumed in favor of the judgment debtor" (*see Rae v. Kestenberg*, 23 AD2d 565 *aff'd* 16 NY2d 1023).

Nevertheless, it is well settled law that a judgment is entitled to full faith and credit if it is valid where rendered, it is conclusive in the forum state, and if it is consistent with the due process requirements of the U.S. Constitution. U.S.C.A. Const. Art. IV, Sec. 1: 28 U.S.C.A. § 1738; *see Atlas Credit Corp. v. Ezrine*, 25 NY2d 219.

Sister-state judgments such as those herein, absent jurisdictional defects or lack of finality, should be afforded full faith and credit. In the case at bar, defendants have not denied their cessation of payments required by the Bond and Warrant, nor have they presented any proof sufficient to raise any triable issues of fact regarding the validity of the Pennsylvania judgments. Thus, the defendants' conclusory allegations do not warrant a trial.

Accordingly, plaintiffs' motion for summary judgment in lieu of complaint is granted and the defendants' cross-motion is denied.

Settle order severing the counterclaims and directing the entry of judgment on the motion herein.

Dated: June 15, 1989

s/_____
J. S. C.

FILED
JUN 29 1992
OFFICE OF THE CLERK

(2)

No. 91-1923

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

v.

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

On Petition For a Writ of Certiorari To The New York State Court of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the New York State Court of Appeals correctly accorded full faith and credit to a Pennsylvania cognovit judgment based upon its conclusion, as a matter of law, that Petitioners had voluntarily, knowingly and intelligently waived their due process rights to notice and hearing prior to the entry of a civil judgment.

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1923

OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH M. ARONOW and ANTHONY GALIOTO,

Petitioners,

v.

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, d/b/a FL&S ASSOCIATES,

Respondents.

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Because Petitioners' recitation of the opinions below omits certain critical opinions, Respondents provide the

following full recitation and attach the omitted opinions in a Supplemental Appendix.[1]

The New York State Court of Appeals unanimously affirmed the order of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, which had affirmed (also unanimously) the order of the Supreme Court of the State of New York, County of New York. The court of appeals opinion dated and entered on December 23, 1991, is reproduced in the Petitioners' Appendix,[2] Pet. App. at 1a-13a, and has been published (*Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 585 N.E.2d 364 (N.Y. 1991), *reh'g denied*, 590 N.E.2d 253 (N.Y. 1992)).[3] The decision of the Supreme Court of the State of New York, Appellate Division, First Judicial Department unanimously affirming the trial court's decision is reproduced in the Petitioners' Appendix and has been published (*Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 565 N.Y.S.2d 799 (App. Div. 1991), *stay denied*, 578 N.E.2d 445 (N.Y. 1991)).[4] Pet. App. 15a-23a. The

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[1]All of the material included in Respondents' Supplemental Appendix was presented to the New York State Court of Appeals as part of the Record on Appeal. All citations to "S.A." refer to the Supplemental Appendix to this Brief.

[2]All citations to "Pet. App." refer to the Appendix to the Petition filed by Petitioners at No. 91-1923.

[3]Petitioners' motion for reargument to the court of appeals was denied without dissent, in an unpublished order dated February 25, 1992. Pet. App. 14a.

[4]Petitioners' motion for clarification and reargument to the appellate division was denied, without dissent, in an unpublished order dated May 9, 1991. Pet. App. 24a-25a.

unreported opinion and order of the Supreme Court of the State of New York, County of New York is also reproduced in Petitioner's Appendix, Pet. App. 26a.

As noted above, the New York State Court of Appeals affirmed decisions of the lower New York courts granting full faith and credit to judgments entered against each of the Petitioners in the Court of Common Pleas of Centre County, Pennsylvania (the "Judgments"). The original Pennsylvania cognovit Judgments were entered on September 9, 1989 and notice of the entry of the Judgments was sent to each of the Petitioners by the clerk of courts (an office in the Pennsylvania court system known as the "Prothonotary"). S.A. 1a-9a. Subsequently, in an unpublished opinion and order dated July 14, 1989, the Court of Common Pleas of Centre County, Pennsylvania denied Petitioners' motion to open or strike the Judgments. S.A. 10a-14a. Although Petitioners failed to appeal that order in a timely manner, Petitioners Aronow and Galioto subsequently filed both a petition to vacate the Pennsylvania Judgments for lack of subject matter jurisdiction and a related petition to stay discovery in aid of execution on the Judgments. After an evidentiary hearing the trial court in Pennsylvania, in an unpublished opinion and order dated October 18, 1989, denied both the petition to vacate the trial court judgment and the petition to stay proceedings in aid of execution. The trial court, which had previously held Petitioners in contempt and issued sanctions against them based upon their repeated failure to respond to discovery or comply with the court's order, again held Petitioners in contempt and issued sanctions. S.A. 15a-30a. Petitioners appealed both orders, and in an opinion dated January 15, 1991, the Superior Court of Pennsylvania unanimously affirmed the trial court's orders denying Petitioners' motions to stay

discovery and to vacate, granting sanctions and holding Petitioners in contempt. The January 15, 1991, opinion is reproduced in the Supplemental Appendix and has been published (*Fiore v. Oakwood Plaza Shopping Ctr., Inc.*, 585 A.2d 1012 (Pa. Super. Ct. 1991)). S.A. 31a-54a.

STATEMENT

A. The Transaction

These proceedings relate to a transaction between Respondents and Petitioner Oakwood Plaza Shopping Center, Inc. ("Oakwood"), a Pennsylvania corporation in which Petitioners Joseph M. Aronow and Anthony Galioto are principals. By an Agreement of Sale dated February 14, 1986, Respondents agreed to sell approximately 14.8 acres of property located in Patton Township, Centre County, Pennsylvania, to State College Development Company, the predecessor-in-interest to Oakwood. Pursuant to the terms of that agreement, the full purchase price was to be paid in cash to Respondents at closing. However, at Petitioners' request, Respondents eventually agreed that Petitioners would pay Respondents the total sum of $700,000 at closing and that the balance of the purchase price would be secured by a purchase money mortgage and payable pursuant to a note. Accordingly, on December 23, 1986, Petitioner Oakwood executed a purchase money mortgage (the "Mortgage") in the amount of $1.1 million on the 14.8 acres of property, representing the balance due on the purchase of the property. Petitioners Oakwood, as well as Aronow and Galioto individually, executed a bond and warrant (the "Note") obligating Petitioners to pay Respondents $1.1 million with interest at 9% per annum. The Note included a cognovit judgment provision specifically authorizing the entry of

judgment against Petitioners by confession. Pet. App. 2a-3a.[5]

B. The Pennsylvania Proceedings

On September 9, 1988, after Petitioners had defaulted on their obligations under the Note, Respondents filed a complaint in confession of judgment as well as a praecipe to enter judgment against Oakwood, Aronow and Galioto. Pa. R. Civ. P. 2951. The Prothonotary of the Court of Common Pleas of Centre County, Pennsylvania entered Judgments against Petitioners, S.A. at 1a-9a, and immediately sent notices of entry of the Judgments and a copy of the complaint in confession of judgment to each of the Petitioners. Pa. R. Civ. P. 236(a)(1). On November 9, 1988, Respondents served discovery in aid of execution upon Petitioners. When Respondents received no responses, they filed a motion to compel discovery and for sanctions against Petitioners. On January 26, 1989, after serving notice upon Petitioners with respect to the hearing on Respondents' motion, the court of common pleas issued an order granting Respondents' Motion to Compel as well as imposing sanctions against Petitioners for failure to respond to Respondents' discovery. When Petitioners continued to defy the orders to comply with discovery, the court imposed additional sanctions.

Not until May 10, 1989, over eight months after the entry of the Judgments, did Petitioners first respond to the

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[5]Contrary to the assertions in the Petition, the cognovit provision was not "buried" in the Note, but appears on page 3 of a three-page document several lines above Petitioners' signatures. It is the *only* provision, other than the execution language and signature lines, on that page of the Note. Pet. App. 11a-12a.

Pennsylvania action by filing a petition to open or strike the Judgments pursuant to Pa. R. Civ. P. 2959. Despite the doubtful timeliness of their motion, Petitioners were given an opportunity to present any and all defenses to the claims made by Respondents; Petitioners availed themselves of that opportunity, both in voluminous briefs and during a hearing in Pennsylvania in which Petitioners were represented by counsel.

In an order dated July 14, 1989, the court of common pleas denied the petition to open or strike the Judgments, S.A. at 10a-14a, determining, *inter alia*, that Petitioners could not present any valid defense on the merits. On September 5, 1989, 23 days after the expiration of the statutory 30-day appeal period, Petitioners filed a Notice of Appeal with the Superior Court of Pennsylvania from the order denying the petition to open or strike the Judgments. When Respondents moved to quash the Notice of Appeal as untimely, counsel for Petitioners withdrew the appeal.

Because Petitioners still had not complied with the court of common pleas' orders directing Petitioners to answer Respondents' discovery in aid of execution, the court once again held Petitioners in contempt and ordered Petitioners to respond within ten days and eventually assessed additional fines of $3,000 for every day that Petitioners remained in contempt.

At the hearing on the contempt issue, counsel for Petitioners presented both a petition to vacate the judgment for lack of subject matter jurisdictions and a petition to stay discovery in aid of execution. The petition to vacate was premised upon Petitioners' claim that a necessary party, a real estate broker in the transaction,

was not joined. On October 18, 1989, after considering the papers submitted by Petitioners and after a full hearing, the court dismissed both petitions. The order denying the petitions was ultimately affirmed by unanimous decision of the Pennsylvania Superior Court, as were the contempt citation and the sanctions imposed by the trial court. S.A. 31a-54a.

C. The New York Judgment

On or about January 20, 1989, having been unable to obtain Petitioners' cooperation on discovery, Respondents filed in the Supreme Court of the State of New York, County of New York, a motion for summary judgment in lieu of complaint, along with supporting papers. Petitioners filed opposition papers in response. After considering the voluminous affidavits and memoranda and hearing oral argument on the matter, the supreme court issued an opinion and corresponding order, granting Respondents' motion for summary judgment on the grounds, *inter alia*, that the Pennsylvania Judgments are valid and enforceable and are entitled to full faith and credit in New York. Judgment on the order was entered on September 8, 1990. On appeal, after extensive briefing and oral argument, the Supreme Court of the State of New York, Appellate Division, First Department unanimously affirmed the trial court's judgment. Petitioners appealed to the New York State Court of Appeals, which also held unanimously that the Pennsylvania Judgments were entitled to full faith and credit. This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Petitioners have demonstrated no basis for granting certiorari in this case. The decision of the court below is correct. The conclusion that the Pennsylvania Judgments are entitled to full faith and credit reached initially by the trial court was unanimously endorsed by a panel of four judges at the appellate division and by the entire seven-member court of appeals. There was not a single dissent at any level and reargument was denied when Petitioners urged the same arguments they now present to this Court. Contrary to Petitioners' arguments, there is no conflict between the court of appeals' decision and the decisions of other courts. Most significantly, the decision of the lower court does not conflict with, but instead faithfully implements, this Court's companion decisions in *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Swarb v. Lennox*, 405 U.S. 191 (1972). Accordingly, review by this Court is not warranted and certiorari should be denied.

Petitioners apparently assert two arguments in support of their petition for writ of certiorari. First, Petitioners claim that the decision below conflicts with *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *FRG, Inc. v. Manley*, 919 F.2d 850 (3d Cir. 1990). According to Petitioners those cases require, where judgment has been entered by confession, that any finding of voluntary, knowing and intelligent waiver of notice and hearing prior to the entry of judgment be based solely upon "undisputed facts."

Second, Petitioners contend that the New York State Court of Appeals' opinion conflicts with an opinion of the Supreme Court of California, *Isbell v. County of Sonoma*,

577 P.2d 188 (Cal.), *cert. denied*, 439 U.S. 996 (1978), which Petitioners claim holds that signatories to a confessed judgment clause are constitutionally entitled to a hearing *prior to the entry of a judgment* to determine the voluntariness of their waiver.

Petitioners' arguments are neither meritorious nor remotely worthy of this Court's plenary consideration. With respect to their first contention, although the lower New York courts each found as a matter of law that Petitioners had been accorded their due process rights, Petitioners never before raised an argument regarding those courts' reliance upon "disputed facts." Accordingly, this Court should not (and perhaps may not) review that issue upon the instant petition. Further, upon close scrutiny the "disputed facts" argument is nothing more than a case-specific quibble over the wisdom of the New York courts' conclusions of law.

As to Petitioners' second argument, neither this Court in *Overmyer* and *Swarb*, nor the Third Circuit in *FRG*, established any constitutional requirement of a prejudgment hearing to determine the voluntariness of a waiver of due process rights pursuant to a confession of judgment provision. Numerous federal and state court cases argue against any such constitutional requirement, and to the extent that any language from *Isbell* is to the contrary, the California Supreme Court in *Isbell* was interpreting a California law substantially different from that existing in Pennsylvania.

I. PETITIONERS' PRIMARY ARGUMENT IS BASED UPON ISSUES NOT PROPERLY PRESERVED BELOW

Although Petitioners contended (only before the New York courts) that there was not sufficient evidence to support a finding of the voluntariness of their waiver, they never before raised the argument that a court may not determine voluntariness based upon "disputed facts" which they now assert before this Court. Only now, after the New York courts denied the relevance of Petitioners' factual assertions and determined that their waiver was voluntary, as a matter of law, have Petitioners released their sandbag and argued that it was inappropriate for the New York courts to make a finding of a valid waiver based upon allegedly "disputed facts."

"In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992). Although this rule is prudential in cases arising from federal courts, *Carlson v. Green*, 446 U.S. 14, 17, n.2 (1980), where, as here, a case arises from state courts, the prohibition may be jurisdictional. *See Illinois v. Gates*, 462 U.S. 213, 218-220 (1983), *reh'g denied*, 463 U.S. 1237 (1983). Whether the rule is jurisdictional or prudential, this Court should deny the petition for writ of certiorari on Petitioners' "disputed facts" question because Petitioners had the opportunity but failed to raise or address the argument below.

II. THE LOWER COURT'S DECISION IS CORRECT AND IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

The sole question before the New York courts in this case was whether the confessed Judgments entered in Pennsylvania were entitled to full faith and credit in New York. Specifically, review by the courts in New York was restricted to determining whether the rendering court had jurisdiction, an inquiry which includes due process considerations. *Riehle v. Margolies*, 279 U.S. 218, 225 (1929). The supreme court, the appellate division and the court of appeals each considered independently, and ultimately rejected, Petitioners' due process claims; based upon language of the operative documents and certain admitted facts (e.g., that Petitioners were sophisticated parties engaged in an arms-length transaction and that Petitioner Aronow is an attorney), the courts concluded that Petitioners had knowingly and voluntarily executed the confessed judgment provision.

In the companion cases of *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) and *Swarb v. Lennox*, 405 U.S. 191 (1972), this Court had occasion to determine the constitutionality of confessed judgment provisions identical to that at issue here. Although this Court held in *Overmyer*, that the facts of each case "are important," 405 U.S. at 187-88, it found that "*under appropriate circumstances*, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision," *Swarb*, 405 U.S. at 200 (emphasis added), and that the "standard for waiver in a corporate-property-right case of this kind is . . . that it be voluntary, knowing and

intelligently made." *Overmyer*, 405 U.S. at 185-186. That standard was fully satisfied here. Further, quoting from the lower court's opinion in *Swarb*, this Court stated that "it was not the federal court's function to dictate to Pennsylvania exactly what constitutes understanding waiver," *Swarb*, 405 U.S. at 199 (quoting *Swarb v. Lennox*, 314 F. Supp. 1091, 1100 (E.D. Pa. 1970) (per curiam) (three-judge panel)), expressly leaving it to the courts of Pennsylvania, or in this case New York, to determine what facts are sufficient to establish as a matter of law that a debtor has voluntarily waived its rights.[6]

This Court, quoting the district court's opinion in *Swarb*, stated that "where the debtor is an attorney, an affidavit to that effect may be all that is necessary to prove understanding." *Id.* The Court implied in *Swarb* that the then-existing Pennsylvania cognovit judgment proceeding may be unconstitutional as applied to low income, uneducated individuals who signed boilerplate residential loan documents containing cognovit provisions. Petitioners' attempt to portray a conflict between the New York Court of Appeals' opinion in this case and this Court's opinion in *Overmyer* must fail because, regardless of Petitioners' pleas to the contrary, the facts in this case, as presented to the courts in Pennsylvania and New York, are similar to those in *Overmyer*. Like *Overmyer*, the

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[6]In situations where the debtor raises the issue of voluntariness of waiver and evidence on the circumstances of the waiver is clearly lacking and insufficient for the court to make a determination, a separate evidentiary hearing on that issue may be advisable. However, that is not the case here. Petitioners failed to raise the waiver issue before the Pennsylvania courts and the New York courts concluded that the undisputed facts were sufficient as a matter of law to demonstrate the knowing, voluntary and intelligent nature of Petitioners' waiver.

parties here are sophisticated business entities, well educated and involved in a commercial transaction dealing in large sums of money. Moreover, at least in the person of Petitioner Aronow, Petitioners were represented by counsel.[7] Finally, Petitioners negotiated the drafting of the contract between the parties to such a degree that they required an extensive addendum to be added to the contract.

The changes made to the agreement demonstrate that Petitioners had bargaining power in the negotiation process. For example, contrary to the original terms that required full payment at closing, Petitioners were able to obtain the property based upon a down payment to Respondents with a promise, secured by a mortgage, that the balance of the purchase price would be paid in the future. Respondents were, in return, compensated for this concession through the provisions in the Note. Those provisions included a clear and conspicuous confession of judgment clause located just above Petitioners' signatures. Pet. App. 11a-12a.

The above-cited facts clearly demonstrate that sufficient undisputed evidence before the New York Court of Appeals established, as a matter of law, that Petitioners had knowingly, voluntarily and intelligently waived their

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[7] It is undisputed that Mr. Aronow, one of the debtors in this case, is an attorney licensed to practice law in the State of New York. The mere fact that Mr. Aronow is not licensed to practice law in Pennsylvania is irrelevant because Petitioner Aronow's legal training establishes that he has the ability to read and understand legal provisions in a document. It is an inability to understand the meaning of contractual provisions which concerned this Court in *Overmyer*, and especially in *Swarb*.

rights to prejudgment notice and hearing. As the New York Court of Appeals stated "[t]he bald assertion that these sophisticated defendants, entering upon a significant transaction, did not read the document cannot excuse their legal obligation or overcome the substantial evidence of waiver." Pet. App. 12a. This Court in *Overmyer* noted that the confession of judgment procedure serves a "proper and useful purpose in the commercial world." *Overmyer*, 405 U.S. at 188. The instant case is just one example of the intended usefulness of confessed judgments.

The opinion of the United States Court of Appeals for the Third Circuit in *FRG, Inc. v. Manley*, 919 F.2d 850 (3d Cir. 1990), is not to the contrary. Although in *FRG* "the facts [were] not in dispute", *id.* at 852, that was not a point critical to the court's holding. The Third Circuit in *FRG* expressly followed this Court's opinion in *Overmyer* when it stated that this Court "recognized that in *some* circumstances a knowing debtor could be held to have effectively and legally waived due process rights with respect to notice in litigation which it would otherwise possess absent a confession of judgment clause." *Id.* at 856 (emphasis added). As the New York Court of Appeals did here, the Third Circuit in *FRG* merely determined that under the circumstances before it, there was a clear showing of voluntary waiver. The Third Circuit did not hold that a voluntary waiver could *only* be found in circumstances where all of the facts are undisputed. Furthermore, like the New York Court of Appeals' determination that the instant parties were "sophisticated" -- a finding Petitioners condemn as a "mere conclusion" -- the court in *FRG* asserted that "the debtors *. . . seem[ed] to be business entities with sophisticated*

principals, knowledgeable in business matters." *Id.* at 857 (emphasis added). *See* Pet. App. 11a-12a.

The United States Bankruptcy Court for the Southern District of New York also had occasion to analyze the Pennsylvania cognovit judgment statutes under the Due Process Clause of the United States Constitution. *In re PCH Assocs.*, 122 B.R. 181 (Bankr. S.D.N.Y. 1990). *PCH Associates* held that the Pennsylvania statutes were consistent with due process requirements, as set forth by this Court in *Overmyer*, "where *ample evidence* was shown that the debtor voluntarily, knowingly and intelligently waived his rights to notice and a hearing prior to the entry of a civil judgment." *Id.* at 192 (emphasis added). *PCH Associates* contained no suggestion that a determination could only be made where all relevant facts are undisputed, but instead, consistent with this Court's opinion in *Overmyer*, held only that there must be "*ample evidence*" of voluntary, knowing and intelligent waiver. That is precisely the finding which the New York Court of Appeals made in this case.[8]

Finally, stripped of its rhetoric and false assertions of conflict, Petitioners' problem with the court of appeals' decision is not that the court held it permissible to rely upon disputed facts, but rather, according to Petitioners, that the court may inadvertently have relied upon certain disputed facts. Although Respondents believe that the court of appeals properly found a valid waiver based upon undisputed facts and exhibits, the determination whether

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[8]In another part of the opinion, the court's formulation of the standard was that there need only be "*sufficient evidence* to establish waiver." *PCH Assocs.*, 122 B.R. at 194 (emphasis added).

the court below engaged in impermissible appellate fact finding in violation of New York law is not an endeavor worthy of this Court's time and attention. It is well established that the Supreme Court "does not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

III. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THOSE OF OTHER COURTS

Petitioners assert that the Pennsylvania confessed judgment procedures, Pa. R. Civ. P. 2950-2986, are facially invalid because they do not provide a debtor with an opportunity for a hearing *prior* to the entry of the confessed judgment to determine whether the debtor has validly waived its rights to prejudgment notice and an opportunity to be heard. Petitioners assert that there is a conflict between the New York Court of Appeals and other courts on this issue. The argument Petitioners seek to fashion in order to justify consideration of their petition is neither valid nor worthy of this Court's review.

Initially, Petitioners' argument flies directly in the face of *Overmyer* and *Swarb*, in which this Court held that the Ohio and Pennsylvania confessed judgment statutes, which contain no pre-judgment hearing provisions, were not *per se* unconstitutional. Moreover, Petitioners' argument that due process requires notice and an opportunity to be heard *prior* to the entry of a confessed judgment is contrary to established law.

In the seminal decision on the timing requirements of the Due Process Clause, this Court held "that the right to notice and an opportunity to be heard must be granted *at a meaningful time*." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added). A "meaningful time" means prior to the deprivation of a significant property interest not prior to the entry of judgment. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (Due process has a "root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (emphasis in original); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339-40 (1969) (holding that the taking of property by a garnishment proceeding, absent notice and prior hearing, violates due process); *Chittester v. LC-DC-F Employees of G.E. Fed. Credit Union*, 384 F. Supp. 475, 479 (W.D. Pa. 1974) ("We have always believed that the 'deprivation' of a significant property interest would occur at a judicial sale on execution of a debtor's property . . . ."); *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972).

Consistent with the above-cited cases, Pennsylvania courts have held a meaningful time to be prior to *execution* on property, not prior to the entry of judgment on the debt. *See, e.g., Federman v. Pozsonyi*, 529 A.2d 530 (Pa. Super. Ct. 1987); *North Penn Consumer Discount Co. v. Schultz*, 378 A.2d 1275, 1278 (Pa. Super. Ct. 1977); *accord Chittester*, 384 F. Supp. at 479 (holding that "the meaningful time for the opportunity to be heard on any defense to a confession of judgment is prior to any proceeding to begin to *execute*, on the judgment") (emphasis added). Petitioners cannot contend that any of their property was executed upon prior to their

opportunity to be heard in Pennsylvania.[9] Indeed, to this date, Respondents have been unable to execute on any of Petitioners' property. Accordingly, Petitioners have not suffered any deprivation of property. Moreover, though Petitioners had and exercised a post-judgment opportunity to be heard in the Pennsylvania courts, they failed to raise the due process arguments that they now seek to present.

Petitioners have cited several cases, some in a footnote, which they believe support their argument that they were entitled to a hearing prior to the entry of the confessed judgment. None is on point. Initially, Petitioners rely upon the California Supreme Court's opinion in *Isbell v. County of Sonoma*, 577 P.2d 188 (Cal.), *cert. denied*, 439 U.S. 966 (1978). However, the California Supreme Court in *Isbell* was analyzing an entirely different statutory procedure. The *Isbell* Court, in concluding that a hearing prior to entry of judgment was required, contrasted the California scheme to the Ohio scheme involved in *Overmyer*, by emphasizing that, unlike Ohio, California provided *no notice of entry of judgment* and severely restricted the grounds for post-judgment attack. *Id.* at 195. Since the Pennsylvania confessed judgment scheme is

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[9] Notice of the entry of the judgment must be sent to the debtor by the Prothonotary. Pa. R. Civ. P. 236(a)(1). Pursuant to Pa. R. Civ. P. 2959, debtors have the right in Pennsylvania to petition to open or strike a confessed judgment. Upon filing a petition to open or strike, the debtor is entitled to an evidentiary hearing and to have the judgment opened "[i]f evidence is produced which in a jury trial would require the issues to be submitted to the jury." Pa. R. Civ. P. 2959(e). All defenses and objections that are not raised are waived. Pa. R. Civ. P. 2959(c). It cannot be gainsaid that Petitioners had notice and an opportunity to be heard and actually availed themselves of that opportunity.

identical to the Ohio scheme approved by this Court in *Overmyer* in these respects, Petitioners' citation to *Isbell* is inapposite.[10]

Petitioners also cite several other cases to support their argument of entitlement to a prejudgment hearing. *See Virgin Islands Nat'l Bank v. Tropical Ventures, Inc.*, 358 F. Supp. 1203 (D.V.I. 1973); *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972); *Osmond v. Spence*, 327 F. Supp. 1349 (D. Del. 1971), *vacated*, 405 U.S. 971 (1972);[11] *In re*

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[10]Although certain passages in *Isbell* imply a constitutional requirement for a pre-judgment hearing, in light of the court's alternative bases for the decision such passages are properly viewed as *dicta*.

[11]Petitioners failed to point out that the *Osmond v. Spence* opinion was vacated by this Court. On remand, the district court in Delaware held that, in light of the companion holdings in *Overmyer* and *Swarb*, due process as it relates to confessed judgments entered prior to the "first opinion and in accordance with a Delaware commercial practice of ancient origin and long standing, requires only that *before an execution is issued*, or upon application by a judgment debtor, the judgment creditors be required to establish that the individual against whom the judgment on a cognovit note was entered effectively waived his constitutional rights by executing the note." *Osmond v. Spence*, 359 F. Supp. at 127 (emphasis added). This holding is consistent with the positions taken by courts on the Pennsylvania confession of judgment procedure and also with all due process cases related to this issue, which hold that due process only requires that the debtor be given an opportunity for a hearing at a meaningful time, which translates to any time before execution. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67 (1972); *Chittester v. LC-DC-F Employees of G.E. Fed. Credit Union*, 384 F. Supp. 475 (W.D. Pa. 1974).

Souders, 75 B.R. 427 (Bankr. E.D. Pa. 1987), *overruled by FRG, Inc. v. Manley*, 919 F.2d 850, 856 (3d Cir. 1990).[12]

In response, as the Bankruptcy Court for the Southern District of New York stated:

> While the ultimate common goal of [those cases is] laudable, they are not controlling here. First, given that the [United States] Supreme Court has already spoken to [and affirmed] the constitutionality of the Pennsylvania statutory scheme regarding confessed judgments, the *Souders* decision cannot be given any weight to the extent that it attempts to overrule the Supreme Court. Second, the *Osmond*, *Virgin Islands* and *Souders* decisions demonstrate the discretionary powers of courts to address the waiver issue at a separate judicial hearing *where there is a deficiency of facts before the court*.

PCH Assocs., 122 B.R. at 193-94 (footnote omitted) (emphasis added).

In sum, because Pennsylvania's statutory scheme provides an opportunity for a hearing at a constitutionally meaningful time, i.e., prior to execution, and in the absence of any direct conflict on the issue, the question whether the Petitioners were constitutionally entitled to a pre-judgment hearing is simply answered in the negative and does not otherwise merit this Court's plenary consideration.

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[12]In its ruling in *FRG*, the Third Circuit expressly rejected the *Souders* opinion to the extent that it required a prejudgment hearing on voluntariness of waiver.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Jeffrey J. Ludwikowski
Richard P. Bress
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Counsel for Respondents

June 29, 1992

SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	) CIVIL DIVISION) G.D. No.) Issue No.)
Plaintiffs,	) NOTICE OF ENTRY OF JUDGMENT) Filed on behalf of
v.	) Plaintiffs)
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	) Counsel of Record) for this Party:) Roy A. Powell, Esq) PA I.D. #37487) Rose, Schmidt,) Hasley & DiSalle
Defendants.	) Firm #043) 900 Oliver Building) Pittsburgh, PA) 15222-5369) (412) 434-8600

CERTIFIED from the records as entered and filed in this office
21 day of Sept. A.D. 1988
/s/ David L. Immel
Prothonotary and Clerk of the Court

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
	)	G.D. No.____
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	)	
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

TO: Oakwood Plaza Shopping Center, Inc.
1901 E. College Avenue
State College, PA 16802

TAKE NOTICE that a Judgment in the amount of One Million, Two Hundred Sixteen Thousand, One Hundred Forty-Five and 00/100 Dollars ($1,216,145.00) has been entered in favor of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard P. Fiore, Harry K. Sickler and Thomas C. Large t/a FL&S Associates and against

Oakwood Plaza Shopping Center, Inc. in the Court of Common Pleas of Centre County, Pennsylvania, on the __ day of _____ of 1988.

_____

_____, Prothonotary

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	CIVIL DIVISION G.D. No. 88-1989 Issue No.
Plaintiffs,	NOTICE OF ENTRY OF JUDGMENT Filed on behalf of Plaintiffs
v.	
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	Counsel of Record for this Party: Roy A. Powell, Esq PA I.D. #37487 Rose, Schmidt, Hasley & DiSalle Firm #043 900 Oliver Building Pittsburgh, PA 15222-5369 (412) 434-8600
Defendants.	

CERTIFIED from the records as entered and filed in this office
21 day of Sept. A.D. 1988
/s/ David L. Immel
Prothonotary and Clerk of the Court

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	)	G.D. No. 88-1989
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

TO: Joseph M. Aronow
14th Floor
300 Madison Avenue
New York, NY 10017

TAKE NOTICE that a Judgment in the amount of One Million, Two Hundred Sixteen Thousand, One Hundred Forty-Five and 00/100 Dollars ($1,216,145.00) has been entered in favor of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard P. Fiore, Harry K. Sickler

and Thomas C. Large t/a FL&S Associates and against Joseph M. Aronow in the Court of Common Pleas of Centre County, Pennsylvania, on the 9th day of September of 1988.

_____

_____, Prothonotary

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	) CIVIL DIVISION) G.D. No. 88-1989) Issue No.)
Plaintiffs,	) NOTICE OF ENTRY OF JUDGMENT) Filed on behalf of
v.	) Plaintiffs)
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	) Counsel of Record) for this Party:) Roy A. Powell, Esq) PA I.D. #37487) Rose, Schmidt,
Defendants.	) Hasley & DiSalle) Firm #043) 900 Oliver Building) Pittsburgh, PA) 15222-5369) (412) 434-8600

CERTIFIED from the records as entered and filed in this office
21 day of Sept. A.D. 1988
/s/ David L. Immel
Prothonotary and Clerk of the Court

IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
	)	G.D. No. 88-1989
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, JOSEPH M. ARONOW, individually and ANTHONY GALIOTO, individually,	)	
Defendants.	)	

NOTICE OF ENTRY OF JUDGMENT

TO: Anthony Galioto
7000 71st Place
New York, NY 11385

TAKE NOTICE that a Judgment in the amount of One Million, Two Hundred Sixteen Thousand, One Hundred Forty-Five and 00/100 Dollars ($1,216,145.00) has been entered in favor of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard P. Fiore, Harry K. Sickler and Thomas C. Large t/a FL&S Associates and against

Anthony Galioto in the Court of Common Pleas of Centre County, Pennsylvania, on the 9th day of September of 1988.

_____

_____, Prothonotary

SUPPLEMENTAL APPENDIX B

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

LEONARD S. FIORE, SR., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 88-1989
	)	
OAKWOOD PLAZA SHOPPING CENTER, INC., et al.,	)	
	)	
	)	
Defendants.	)	

OPINION AND ORDER

Grine, J.

This matter is before the Court upon Plaintiffs' Complaint in Confession of Judgment, Plaintiffs' Confession of Judgment Where Action Commenced by Complaint, Motion of Defendants to Open or Strike the Judgment, and Motion to Strike Defendants' Petition to Open or Strike Judgment and Response in Opposition to Petition to Open or Strike Judgment. The hearing date for the last two of these motions was June 15, 1989. With respect to these two, Defendants' motion is denied, based on the following.

FACTUAL BACKGROUND

This case arises from a transaction between Plaintiffs and Oakwood Plaza Shopping Center, Inc. By Agreement of Sale, as amended by a Rider, Plaintiffs agreed to sell a parcel of property of approximately 14.8 acres located in Patton Township, Centre County, Pennsylvania, to Defendants' predecessor (State College Development Co.), at a price of $600,000.00 in cash with the balance of the purchase price secured by a purchase money mortgage.

Oakwood executed an indenture that constitutes a purchase money mortgage in the amount of $1.1 million dollars on the 14.8 acres of property. Additionally, Oakwood, as well as Petitioners (Anthony Galioto and Joseph Aronow) individually, executed a bond and warrant obligating Oakwood and Petitioners to pay Plaintiffs $1.1 million dollars with interest at 9% per annum.

Upon receipt of the cash portion of the purchase price, Plaintiffs delivered the necessary deeds for recording to the escrow agent, All necessary documents were delivered to Petitioners. Oakwood and Petitioners failed to make any improvements to the property, defaulted on their obligations and failed to make payments required under the terms of the Bond and Warrant and the purchase money mortgage. Litigation ensued, and Plaintiffs obtained judgments against Oakwood, Aronow and Galioto. After Plaintiffs served many additional documents upon Petitioners and Oakwood over the course of almost 8 months, without response from Petitioners, Petitioners filed the instant Petition to Open or Strike.

DISCUSSION

I. OPENING THE JUDGMENT

A three-prong test is applied to determine whether a judgment should be opened. "[T]he petition to open must be (1) promptly filed, (2) state an adequate excuse why a timely answer was not filed, and (3) show a meritorious defense. *All three criteria must be met." Cross v. 50th Ward Comm. Ambulance Co.*, 365 Pa. Super. 74, 528 A.2d 1369, 1371 (1987) (emphasis added, citations omitted). "[C]ourts have found routinely that a petitioner's failure, to meet any prong of the three-part test is fatal to obtaining the relief sought." *Id.* (citations omitted). Because the following discussion finds the absence of a meritorious defense, the first and second prongs need not be considered.

The defenses alleged by Petitioners, and the reasons for their invalidity, are the following:

1. Failure of conditions precedent

Petitioners contend that they have a defense on the merits based upon a lack of consideration which allegedly arises from a failure of several conditions precedent. Specifically, Petitioners contend that Plaintiffs were required to build a perimeter road around the subject property, obtain building permits for the proposed shopping center construction, and install sewer and water facilities.

There is no lack of consideration in this case since Petitioners have received and are presently in possession of the subject property. Moreover, even if the conditions

Petitioners allege were factual, they constitute nothing more than a breach of a separate contractual obligation to Oakwood and do not affect the validity of the note or the underlying debt.

2. Incomplete note

Petitioners contend that Plaintiffs cannot prevail because they are seeking to recover on an incomplete or altered note and therefore no amount is due. The only plausible grounds alleged for such incompleteness is that the building permit was an element of the note necessary to determine the purchase price of the property, and that the addendum was omitted. This argument fails because Petitioners' debt is calculated based upon documents of record without the necessity of using building permits.

3. Fraud

Fraud must be pleaded with specificity. Pa.R.Civ.P. 1019(b). Thus "the pleadings must adequately explain the nature of the claim to the opposing party so as to permit him to prepare a defense. . ." *In re Estate of Schofield*, 505 Pa. 95 477 A.2d 473, 477 (1984); *Bata v. Central-Penn National Bank of Philadelphia*, 423 Pa. 373, 224 A.2d 174, 179 (1966), cert. denied, 386 U.S. 1007 (1967). Petitioners' conclusory allegations set forth in paragraphs 25 and 26 fail to fulfill this requirement. Petitioners fail to set forth, among other things, who made such allegations, when such allegations were made, how Petitioners relied upon such allegations, and how Petitioners were allegedly damaged by such reliance.

II. STRIKING THE JUDGMENT

A motion to strike is "subject to a defense akin to laches and therefore a motion to strike *must be made within a reasonable time of the entry of judgment." Triangle Bldg. Supplies & Lumber Co. v. Zerman*, 242 Pa. Super. 315, 363 A.2d 1287, 1290 (1976) (emphasis added); *Nixon v. Nixon*, 329 Pa. 256, 198 A.2d 154 (1938). Petitioners' delay of almost nine months, between the date that they were notified of the entry of judgment and the date that they brought this petition, was unreasonable.

Petitioners fail to offer any explanation or excuse for such a delay. In addition, Defendants' effort to disprove the applicability of laches, Brief [In Support of the Motion to Open or Strike], p. 5, citing *James v. Silverstein*, 224 Pa. Super. 489, 306 A.2d 910 (1973), fails because Plaintiffs have been and will continue to be prejudiced in their attempt to collect on their judgments in the event that Aronow and Galioto are permitted to continue to delay this proceeding.

ORDER

AND NOW, this 14 day of July, 1989, Defendants' Motion to Open or Strike the Judgment is DENIED.

BY THE COURT:

/s/David Grine
Judge

SUPPLEMENTAL APPENDIX C

**IN THE COURT OF COMMON PLEAS
OF CENTRE COUNTY, PENNSYLVANIA
CIVIL DIVISION**

LEONARD S. FIORE, SR., LEONARD S. FIORE, JR., RICHARD F. FIORE, HARRY K. SICKLER and THOMAS C. LARGE, t/a FL&S ASSOCIATES,	)	
Plaintiffs,	)	
v.	)	
OAKWOOD PLAZA SHOPPING CENTER, INC., a corporation, and ANTHONY GALIOTO, an individual and JOSEPH ARONOW, an individual,	)	No. 88-1989
Defendants.	)	

OPINION AND ORDER

Grine, J.

This matter is before the Court on Defendants' Oakwood Plaza Shopping Center, Inc., Joseph M. Aronow and Anthony J. Galioto's Petition for Rule to Show Cause Why Discovery in Aid of Execution Should Not be Stayed; on Defendants' Aronow and Galioto's Petition for Rule to Show Cause Why Judgment Should Not be Vacated for

Lack of Subject Matter Jurisdiction; and on the hearing on each Rule on October 10, 1989, at 4:00 P.M. For the following reasons, the Court dismisses the Rule to Show Cause Why Discovery in Aid of Execution Should Not Be Stayed, and the Rule to Show Cause Why Judgment Should Not Be Vacated For Lack of Subject Matter Jurisdiction.

STATEMENT OF PROCEDURAL AND FACTUAL BACKGROUND

The Petition for a Rule to Show Cause Why Judgment Should Not be Vacated for Lack of Subject Matter Jurisdiction, filed by Defendants Joseph Aronow and Anthony Galioto (the "Defendants") is another procedural tactic which Defendants are attempting to employ to avoid the effect of the validly entered judgment in this case that is now over one year old. After failing to comply with the process and orders of this Court for almost nine months, Defendants then sought the aid of this Court to avoid the effect of the September 9, 1988, judgment. After all parties had an opportunity to present full argument, affidavits and legal memoranda on the issue of whether the judgment should be opened, this Court issued an Order denying the Petition to Open and found that the Defendants could not satisfy the elements of the test applicable to a petition to open judgment. In order to avoid the effect of that judgment, Defendants have ignored all discovery served upon them by FL&S Associates, violated Orders issued by this Court and employed other procedural maneuvers. Because Defendants have been unsuccessful in persuading this Court to adopt any of their unmeritorious arguments and inasmuch as any other claims and defenses that were not previously raised are now waived, they now caption this petition as one to

vacate for lack of subject matter jurisdiction, in an apparent attempt to claim that this belated defense is neither waived nor barred by the doctrine of res judicata.

This Court dismissed Defendants' Petition to Vacate the Judgment on the merits for several reasons which are set forth in this Opinion. However, due to Defendants' prior filing of a Notice of Appeal of this matter to the Pennsylvania Superior Court, this Court does not presently have jurisdiction to hear this issue, and on this ground as well, the rule to show cause and the Petition to Vacate are dismissed.

This case arises as a result of a transaction between Plaintiffs and Oakwood Plaza Shopping Center, Inc., ("Oakwood") a Pennsylvania corporation of which Defendants are the principals. By agreement of sale dated July 14, 1986, Plaintiffs agreed to sell a parcel of property of approximately 14.8 acres located in Patton Township, Centre County, Pennsylvania, to State College Development Co. ("Oakwood's predecessor"). Mr. Saul Waxman acted as the real estate broker in that transaction. Initially, pursuant to the terms of the agreement of sale, the full price of the property was to be paid in cash to Plaintiffs at settlement. At Defendants' request, Plaintiffs eventually agreed that, at settlement, Defendants would pay to Plaintiffs the total sum of $700,000.00 and the balance of the purchase price would be secured by a purchase money mortgage that would be subordinated only to land, development and construction financing.

As a result of that agreement, Mr. Waxman agreed that a portion of his commission applicable to the unpaid balance would be paid at such times as the balance of the

agreed purchase price was paid. Mr. Waxman and Plaintiffs agreed that FL&S' Associates' contractual obligation to pay Mr. Waxman the balance of his commission would be secured by Plaintiffs assignment of a six percent (6%) interest in the mortgage to Mr. Waxman. While a small portion of the mortgage was assigned to Mr. Waxman as security for Plaintiffs' contingent obligation to pay Mr. Waxman additional broker's commissions, Mr. Waxman does not, and never did have any interest in the note (the bond and warrant) that is the subject of this proceeding.

On or about December 23, 1986, Oakwood executed an indenture that is identified as and constitutes a purchase money mortgage in the amount of $1.1 million dollars on 14.8 acres of property. Additionally, Oakwood, as well as Defendants individually, executed a bond and warrant obligating Oakwood and Defendants to pay Plaintiffs $1.1 million dollars with interest at 9% per annum. Mr. Waxman was assigned no interest in the bond and warrant. This obligation was secured by the mortgage on the 14.8 acre parcel of property.

Oakwood and Defendants failed to make any improvements to the property, defaulted on their obligations and failed to make payments required under the terms of both the bond and warrant and purchase money mortgage. On September 9, 1988, the Plaintiffs filed a Complaint in Confession of Judgment as well as a Praecipe to Enter Judgment against Oakwood, Aronow and Galioto. On the same day the Prothonotary of the court of Commo Pleas of Centre County, Pennsylvania, entered a final judgment against Defendants and Oakwood and sent Notice of Entry of Judgment and a copy of the Complaint in Confession of Judgment to

Defendants. On November 9, 1988, Plaintiffs served discovery in aid of execution upon Defendants as well as Oakwood by certified and first class mail. On January 6, 1989, not having received responses to their discovery, Plaintiffs filed a Motion to Compel Discovery and for Sanctions against Defendants as well as Oakwood. On January 26, 1989, this Court issued its Order granting Plaintiffs' Motion to Compel and issuing sanctions for failure to respond to discovery filed and served on Defendants.

On May 10, 1989, Defendants filed their Petition to Open or Strike the Judgment. After Plaintiffs responded, and after having heard oral argument on the matter, this Court issued its Order of July 14, 1989, denying Defendants' Petition to Open or Strike the Judgment. On September 5, 1989, 53 days after this Court's Order denying the Petition to Open or Strike the Judgment was entered, Defendants filed a Notice of Appeal of that Order with the Pennsylvania Superior Court. Plaintiffs have filed an Application to Quash the Notice of Appeal filed by Defendants as untimely, and that Application is currently pending before the Superior Court.

On September 18, 1989, this Court issued a Rule to Show Cause Why Defendants Should Not be Held in Contempt for failure to comply with this Court's Order of January 26, 1989, which directed Defendants to respond to Plaintiffs' discovery in aid of execution. On October 2, 1989, after a hearing on the matter, this Court held Defendants in criminal contempt for failure to respond to Plaintiffs' discovery in aid of execution and, pursuant to that determination, fined Defendants $3,000.00. Additionally, this Court ordered that Defendants would have 10 days to respond to the discovery in aid of

execution, otherwise Defendants would be held in civil contempt and fined $1,000.00 per day for every day from the 10th to the 20th day that Defendants did not respond to the discovery, and $3,000.00 per day for every day that they did not respond after the 20th day.

DISCUSSION

I. VACATING JUDGMENT FOR LACK OF SUBJECT MATTER JURISDICTION

A. Appeal Creates Lack of Jurisdiction to Vacate the Judgment or Prior Orders.

"Once a party takes an appeal to an appellate court, the trial court is divested of jurisdiction over the subject matter until further order of the appellate court reinstating jurisdiction." *Ingram v. Dovertown Estates. Inc.*, 307 Pa. Super. 22, 452 A.2d 884, 886 (1983); *see also Oak Lane Shopping Center v. Flame*, 264 Pa. Super. 9, 398 A.2d 721, 723 (1979), Pa. Rule of Appellate Procedure 1701.

Once an appeal has been taken "it is error for the lower court to modify, [vacate] or reverse an order from which an appeal has been taken. This has been the common law rule at least since *Ewing v. Thompson*, 43 Pa. 372 (1862), and has been consistently followed." *Corace v. Balint*, 418 Pa. 262, 210 A.2d 882, 889 (1965); see generally *Bartle v. Bartle*, 304 Pa. Super. 348, 450 A.2d 715 (1982).

Since Defendants filed their Notice of Appeal on September 5, 1989, the Court no longer has jurisdiction to vacate the judgment.

B. Defendants' Contention that Saul Waxman is an Indispensable Party to this Action is Without Merit.

Even if the Court determined that it would otherwise have jurisdiction to hear this matter, it must deny Defendants' Petition to Vacate Judgment for Lack of Subject Matter Jurisdiction because Mr. Saul Waxman is not an indispensable party.

1. Defendants Have Brought This Petition In The Wrong Action.

The present action relates solely to the bond and warrant, or note, executed by Oakwood as well as Aronow and Galioto individually. Judgment was entered on that note in September 1988. Contrary to Defendants' assertion at paragraph 7 of their Petition, Mr. Waxman has no pecuniary interest in the note, is not a party to that note, nor was he assigned any interest in the note by FL&S Associates. FL&S Associates, the Plaintiffs herein, hold the only interest in that note.

A separate action concerns the mortgage in which Mr. Waxman does have an interest.

2. Saul Waxman Has No Joint Interest In The Subject Matter Of This Action Which Would Be Prejudiced By Proceeding To Judgment In His Absence.

Mr. Waxman is not an indispensable party since complete relief can be accorded among those already party to the action without his presence, and his absence will not impair or impede his ability to protect his interest, nor will it leave Defendants at risk of incurring double,

multiple, or inconsistent obligations. *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A.2d 491, 495 (1955). Mr. Waxman's interest in the mortgage was assigned by FL&S Associates solely to secure the payment of funds arising from the separate contractual relationship between Mr. Waxman and FL&S Associates.

Because Mr. Waxman's interest is in the mortgage and arises out of FL&S Associates interest, and since Mr; Waxman's right to the payment of any additional funds relates to FL&S Associates' contractual obligation to him for additional broker's commissions, Mr. Waxman has no direct claim against the Defendants under the bond and warrant or otherwise. Not only is his presence not essential for granting relief in this matter, but it is wholly irrelevant and inappropriate in this action.

Furthermore, Mr. Waxman is not an indispensable party to this action since his interest is in the mortgage and not the bond and warrant; and since that interest is not joint for purposes of Pa.R.Civ.P. 2227(a) ("persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants"). The addendum to the mortgage clearly states that FL&S has *assigned* to Saul Waxman a 6% interest in the mortgage. It does not create a joint interest in the mortgage between the parties nor does it render Mr. Waxman an indispensable party to the present proceedings.

3. The Law Will Imply Consent To A Confession Of Judgment When The Judgment Benefits The Non-Consenting Party.

Mr. Waxman, the real estate broker in this case, is by operation of law an agent for FL&S Associates. Mr. Waxman's interest in the mortgage arises solely out of a contractual agreement between Mr. Waxman and Plaintiffs, to which Defendants are not a party, whereby Plaintiffs assigned a 6% interest in the mortgage securing their obligation to Mr. Waxman. Consequently, even assuming Defendants' argument that Mr. Waxman's consent is a prerequisite to Plaintiffs' maintenance of this action, since this action will directly benefit Mr. Waxman by assuring payment of his remaining brokers commission, the law presumes he consented.

In view of the foregoing, there is neither legal nor factual bases for the argument that Mr. Waxman is an indispensable party. Furthermore, "the rule is that if the merits of the case may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach the result." *Gardner v. county of Allegheny*, 382 Pa, 88, 114 A.2d at 496. In the instant action Mr. Waxman's presence is neither necessary nor appropriate and will serve no purpose whatever.

C. Even If Mr. Waxman Were An Indispensable Party, The Proper Remedy In This Case Is Not To Vacate The Judgment But Merely To Order Mr. Waxman Added As A Party.

Even if Defendants could reasonably contend that Mr. Waxman is an indispensable party, the judgment

previously entered in this action should not be vacated. Pursuant to Pennsylvania Rule of Civil Procedure 2227, a joint obligee should not bring an action alone to recover his proportionate share under a contract. "If he does sue alone, however, the name of the other obligee may be added by amendment, even after the testimony is closed, so long as the defendant is not prejudiced by the delay in adding the additional obligee." Goodrich-Amram 2d Sec. 2227(a); 2 at p. 384. Defendant in the present action fails to allege such prejudice.

"The action should not be dismissed because of the omission of even an 'indispensable' party." Goodrich Amram 2d Sec. 2232(c):1 citing *Beck v. Kilroy*, 1 Dist. S. Co. Rep. 2d 777 (1954). "The new party may be added at any stage in the action. It may be done during the trial or even after the testimony is closed." Goodrich-Amram 2d at Sec. 2232 (c):1.3 at p. 565.

D. Defendants Are Incorrect In Asserting That The Bond Warrant (the "Note") And The Mortgage Should Be Read Together As One Instrument.

The three cases which Defendants cite as support for their proposition that the note and mortgage should be read as one instrument in order to determine the intention of the parties are inapplicable to the instant action. *See e.g. Housing Mortgage Corp. v. Allied Construction. Inc.*, 374 Pa. 312, 319, 97 A.2d 802, 805 (953); *Colbassani v. Society of Christopher Columbus*, 159 Pa. Super. 414, 417, 48 A.2d 106, 107 (1946); *Williamsport National Bank v. First National Bank of Williamsport*, 334 Pa. 130, 5 A.2d 228 (1939). All of these cases are legally inapposite to the instant case and further, are factually distinguishable.

All three of the cases cited by Defendants involve a single transaction whereby a single debtor pledged to pay debts to one or more creditors. These debts were all secured by mortgages on a single parcel of property given by a single debtor directly to the creditors. The rights of all the creditors attached in the same transaction. In these cases, the courts correctly held that the debt instruments and mortgages should all be read together in order to determine the proper interpretation of a contract arising from one continuous transaction.

In the instant case, the facts are vastly different from those involved in the cases above. In fact, the present case involves two separate transactions in which two separate debtors pledged differing interests to separate creditors who obtained their rights at different times. The first transaction consisted of Defendants' pledge to Plaintiffs to pay a sum, which is reflected in the note, in return for the conveyance of the 14.8 acre parcel in Patton Township. As security for this pledge, Defendants granted Plaintiffs a mortgage on the subject property. In this transaction, Defendants are the debtors and Plaintiffs are the creditors. A totally separate transaction, which did not involve Defendants, took place between Plaintiffs and Mr. Saul Waxman. That transaction consisted of a contract between Plaintiffs and Mr. Waxman whereby Plaintiffs agreed to pay Mr. Waxman a broker's fee for his services as a real estate broker. As security for their debt to Mr. Waxman, Plaintiffs assigned a 6% interest in the mortgage which they received from Defendants. In the second transaction, Plaintiffs are the debtors and Mr. Waxman is the creditor.

The cases cited by Defendants simply do not apply in the instant action. It is readily apparent that Mr.

Waxman's interest in the mortgage is not coextensive with any interests which arise as a result of the note, since those interests are not a result of the same transaction and do not involve the same parties. Furthermore, the intention of the parties to the addendul to the mortgage, namely FL&S Associates and Saul Waxman, must be determined without reference to the note because the note does not involve the transaction between FL&S Associates and Saul Waxman. In fact, Mr. Waxman has testified that it was never his intention or belief that he had an interest in the note.

II. STAY OF DISCOVERY IN AID OF EXECUTION

A. Defendants Are Not Entitled To A Stay Of Discovery Based Upon Their Petition For A Rule To Show Cause Why Judgment Should Not Be Vacated For Lack Of Subject Matter Jurisdiction.

Defendants' Petition for a Rule to Show Cause why Justment Should Not be Vacated for Lack of Subject Matter Jurisdiction cannot form the basis for a stay of discovery in this matter because the Court dismisses that Rule herein for the reasons stated above.

B. Defendants Have Failed To Properly Perfect Their Appeal Or Supersedeas And Stay In The Present Action.

Defendants contend that because they have filed a Notice of Appeal, discovery in aid of execution should be stayed. However, Defendants have failed to comply with the Pa. Rules of Appellate Procedure in order to properly

perfect the appeal or a supersedeas to stay discovery in aid of execution in this matter.

It is well-established that a prerequisite to the issuance of a supersedeas is the existence of a valid appeal. *See generally, Wilkinson v. United Parcel Service*, 158 Pa. Super. 34, 43 A.2d 414, 415 (1945). Only Defendants Aronow and Galioto have filed a Notice of Appeal. However, even Aronow and Galioto's Notice of Appeal of this Court's Order of July 14, 1989, was not filed until September 5, 1989, 53 days after the entry of the Order. Accordingly, the Notice of Appeal is untimely and cannot support the requested stay. Even if Defendants appeal were timely, it neither operates as nor entitles Defendants to, a stay of discovery in aid of execution.

Although Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that the trial court no longer has jurisdiction in a matter after appeal has been taken, the exceptions to that rule provide that the trial court may continue to "enforce any order entered in the matter, unless the effect of the order has been *superseded* as prescribed in this chapter." This Court, therefore, retains jurisdiction to enforce its prior order of January 26, 1989, directing Defendants to respond to discovery in aid of execution, absent an appropriate supersedeas issued by the Superior Court. This Court is empowered to enforce its orders, even after Notice of Appeal, by means of contempt. *See Rosenberg v. Holy Redeemper Hosp.*, 351 Pa. Super, 399, 506 A.2d 408, 414 (1986).

Defendants contend that since they have filed a Notice of Appeal from this Court's Order of July 14, 1989, denying their Petition to Open or Strike the Judgment, discovery in aid of execution should be stayed in this

matter. However, pursuant to the Pennsylvania Rules of Appellate Procedure, Defendants are only entitled to a stay of post-judgment proceedings if they "ask for and have done those things necessary to obtain it." *Shinn v. Stemler*, 159 Pa. Super. 129, 47 A.2d 294, 295 (1946). The Rules of Appellate Procedure require that Defendants properly perfect an application for supersedeas and file a bond with the appellate court in order to stay judgment or any post-judgment proceedings ancillary to judgment. *See. e.g.* Pennsylvania Rules of Appellate Procedure 1731-1738. The mere filing of an appeal does not automatically function as a supersedeas and stay the trial court's powers. *Shinn v. Stemler*, 47 A.2d at 295 (Defendant appealed Order denying Petition to Oepn Judgment. Court held Judgment not stayed by appeal). Defendants have neither requested a supersedeas nor filed any bond with the Superior Court.

In addition, even if they had filed an appropriate bond and requested a supersedeas from the Superior Court, Defendants are only entitled to a stay or supersedeas from the appellate court "if the appeal appears to present a question which is meritorious, not frivolous; [and] if any detriment to interested parties resulting from a stay would be less than the harm resulting from a denial of it. . ." *Allets, Inc. v. Penn Tp. Bd. of sup'rs.*, 67 Pa. Commw. 326, 447 A.2d 329. 330 (1982). The Pennsylvania Superme Court has gone so far as to require that Defendants "*make a strong showing* that [they are] likely to prevaid on the merits," *before* they will be granted a stay. *Pa. Pub. Util. Com'n v. Process Gas Consumers*, 502 Pa. 545, 467 A.2d 805, 808-9 (1983) (emphasis added). Defendants cannot establish either of these requirements.

On review, the appellate courts will not disturb a trial court's determination on a petition to open or strike absent a clear and manifest abuse of discretion. *Walters v. Harleysville Mut. Cas. Co.*, 417 Pa. 438, 207 A.2d 852 (1965). This Court's Order of July 14, 1989, denying Defendants' Petition to Open or Strike amply demonstrates that Defendants' appeal is entirely unmeritorious and, on appeal, Defendants have virtually no change of success on the merits. As this Court determined, Defendants failed to demonstrate that they could fulfill the "meritorious defense" factors required to justify opening or striking a judgment. [See this Court's Order of July 14, 1989]. Accordingly, under any analysis, but especially under the no abuse of discretion standard applicable to Defendants' appeal, there is little likelihood that Defendants will prevail on appeal.

Inasmuch as the appeal filed by Aronow and Galioto is not only untimely, but is also without merit, a stay in this case would further prejudice Plaintiffs' attempts to execute on the judgment. The resulting detriment to Plaintiffs would be without reason and serve no legitimate purpose for Defendants' benefit, other than to continue to delay the enforcement of Plaintiffs' rights. Therefore, even if Defendants had properly requested a supersedeas and filed the appropriate security with the Court, they would not be entitled to a stay of discovery, or of any other ancillary post-judgment proceeding of this Court.

ORDER

AND NOW, this 18th day of October, 1989, it is ORDERED that the Rule to Show Cause Why Discovery in Aid of Execution Should Not be Stayed, and the Rule

to Show Cause Why Judgment Should Not be Vacated for Lack of Subject Matter Jurisdiction are DISMISSED.

BY COURT:

/s/David Grine
Judge

SUPPLEMENTAL APPENDIX D

LEONARD S. FIORE, SR., ET AL. Appellee	) IN THE
	) SUPERIOR COURT
	) OF
v.	) PENNSYLVANIA
	)
OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH H. ARONOW, ANTHONY GALIOTO, Appellants	) No. 659
	) Harrisburg 1989
	)
	)
LEONARD S. FIORE, SR., ET AL. Appellee	)
	) No. 660
v.	) Harrisburg 1989
	)
OAKWOOD PLAZA SHOPPING CENTER, INC., JOSEPH H. ARONOW, ANTHONY GALIOTO, Appellants	)
	)
	)

APPEAL FROM THE ORDERS OF THE COURT OF COMMON PLEAS OF CENTRE COUNTY, CIVIL DIVISION AT NO. 88-1989

BEFORE: POPOVICH, HUDOCK and MONTGOMERY, JJ.

OPINION BY POPOVICH, J.: FILED: JAN. 15, 1991

This case involves an appeal from the October 2 and 18, 1989, orders of the Court of Common Pleas of Centre County dismissing the defendants/appellants' rules to show cause and holding them in contempt of court. We affirm.

To appreciate the result we reach in the case, a detailed account of the events leading to the present appeal is necessary. Toward that end, the record indicates that Saul Waxman, a real estate broker in central Pennsylvania, was approached by a Doctor David Hadden in regard to property he wished to sell in Centre County. Mr. Waxman, at all times thereafter, represented the partnership of FL&S Associates.[1]

Waxman made contact with Joseph Aronow and Anthony Galioto, both New York residents, who showed interest in purchasing the land in question and constructing a shopping center on the site.

The parties had agreed, at least at first, that the purchase price was to be paid in cash. However, Mr. Aronow altered his position and wanted a subordinated purchase money mortgage to be issued. To this, FL&S agreed without objection. To accommodate Mr. Waxman, the FL&S group offered to secure the payment of the balance of his commission (he had been paid $27,000.00 and could have been owed, depending on the square footage of the center when completed, up to $70,000.00) by assigning him a 6% interest in the mortgage FL&S held on the property sold to the defendants as their security for the remaining monies to be paid.

To validate the sale of the property between the parties, an indenture with Bond and Warrant, along with an accompanying addendum, were executed by the

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[1]FL&S Associates consisted of Leonard S. Fiore, Sr., Leonard S. Fiore, Jr., Richard R. Fiore, Thomas C. Large and Harry K. Sickler, t/a FL&S Associates. This same cadre make up the party-plaintiffs/appellees.

defendants and FL&S. Both the Bond and Warrant and Mortgage documents contained confession of judgment clauses authorizing acceleration of payment of the $1.1 million purchase price plus attorney's fees upon default of the prescribed monthly payments of principal and interest.

Upon failure of the defendants to make payments as required by the various documents, the plaintiffs filed a complaint in confession of judgment demanding a total of $1,216,145.00 (in principal, attorney's commission and 9% interest as of August 26, 1989) from the defendants for "default[ing] . . . under the terms of . . . [a] Bond and Warrant . . . to make agreed upon payments" calculated as $9.00 per square feet times total interior square footage on permit for building less $700,000.00 but not less than $750,000.00. The document was dated December 23, 1986, and executed by Anthony Galioto, as President of Oakwood Plaza Shopping Center, Inc., and individually as did Joseph M. Aronow. The $700,000.00 figure, however, did not appear anywhere in the "form" Bond and Warrant document. Rather, attached thereto was an "addendum" in which the defendants agreed to:

> . . . pay to Obligee [plaintiffs] one-half of the entire principal amount of the obligation secured hereby[*] The entire principal then be due and payable on or before four months after the Commencement date; and **such principal amount is calculated as nine ($9.00) Dollars/per square foot times total interior square footage on permit for building less seven hundred thousand dollars but not less than $750,000.00.*[2]

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[2]The underscored language was added to the "addendum" and appears in hand-written form in the margin of the document.

By notice of even date, the prothonotary of Centre County entered judgments in favor of the plaintiffs and against each of the defendants, separately. Pursuant to Pa.R.Civ.P. 4006, 4009 and 4019, the plaintiffs requested of the defendants that they produce various documents and respond to interrogatories for the discovery of assets to aid in the execution of the judgments.

On January 6, 1989, the plaintiffs filed Motions to Compel and For Sanctions for failure of the defendants to answer interrogatories and/or produce documents. On May 10, 1989, a petition to open or strike judgment was filed by Joseph M. Aronow and Anthony Galioto. It was alleged therein that, on December 16, 1986, the plaintiffs had agreed to sell and the defendants to buy a parcel of land. In furtherance of the sale, the succeeding instruments were signed: (a) agreement of sale with rider; (b) purchase money mortgage with addendum; and (c) warrant with addendum.

It was the contention of the defendants that the plaintiffs had obligated themselves to "obtain all necessary approvals from authorities having jurisdiction over the site for use . . . as a shopping center . . . and to obtain building permits." Paragraph 10. Further, the defendants averred that the plaintiffs, by way of agreement, were to provide: (a) all municipal water and sanitary sewers; and (b) a road around the perimeter of the site for ingress and egress with water, storm and sanitary sewer pipe lines. Paragraphs 12 and 15.

The plaintiffs were held to have failed to comply with any of the "condition[s] precedent to the payments to become due under the Note." Paragraph 24. Because the addendum (which was recorded with the mortgage) took

precedence over the Note, and the former was not attached to the Note when confession of judgment was made, it was the defendants' position that the Note was "not collectible" and unenforceable for the "[P]laintiffs' fail[ure]" to give material consideration as they promised as an inducement to obtain the Note. Paragraphs 35, 37 and 39. The defendants also argued that, because the principal balance due to the plaintiffs under the addendum to the Note was "based on a formula using the total interior square footage as shown by the building permit," the complaint's failure to set forth the square footage permitted by the building permit, or that it was ever issued, justified striking the confession of judgment. Paragraphs 42 and 43.

At this point, it requires that we recite the substance of the Agreement of Sale signed by the interested parties hereto and dated July 14, 1986, with respect to the 14.8 acres of land situate in Patton Township, Centre County. In Paragraph 1, the parties provided that, as a condition to the contract, the plaintiffs/sellers:

> . . . shall obtain approval by all necessary authorities having jurisdiction over the site for use of the site as a Shopping Center or Strip of no less than 161,200 square feet and no more than 200,000 square feet ground coverage for interior commercial space useable for retail shopping.
>
> That said approval shall include provision for municipal water, municipal sanitary sewers to within 50 feet of the site, and acceptable storm sewers or collection pools, all with the right to install, hook-up and utilize at no additional cost or expense for construction other than normal hook-up fees,

connecting pipes of up to 50 feet and on-site storm pipes and pool constriction.

As for the purchase price, it was to be computed based on the square footage of the shopping center to be used for commercial space times $9.00. Paragraph 5. Affixed to the Agreement of Sale was a Rider that took precedence over the Agreement of Sale and required that the plaintiffs/sellers: "present all prepared engineering and architectural studies to local authorities for approval of the exact site plan required by [defendants/]Purchaser." Paragraph 9.

A motion to strike the petition of Joseph M. Aronow and a response thereto were filed. In the latter instrument, the plaintiffs averred that judgment was entered properly based on the defendants' default. The plaintiffs denied that the Agreement of Sale and Rider "were pursuant to any offer" by the plaintiffs. Paragraph 8. And, the allegations in Paragraphs 10, 12, 21 and 27 of the defendants' petition were claimed to be "misstatements of said agreement." Also, the plaintiffs denied not obtaining all necessary approvals and refuted the contention that they had any obligation to obtain building permits. Paragraphs 11, 15, 16, 22, 25, 30, 39, 40 and 43. Lastly, the plaintiffs admitted that the terms of the addendum were incorporated as part of the Bond and Warrant, see Paragraphs 29 and 32, but it was denied that the "Bond and Warrant" was incomplete, altered or failed to include the addendum. Paragraphs 31, 34 and 35. As for the lack of consideration on the obligation to provide a road for ingress and egress, this was denied as well by the plaintiffs. Paragraphs 15 and 39.

In support of the motion in opposition to the petition to open or strike judgment, the affidavits of David Sweetland and Harry K. Sickler, Jr. were submitted by the plaintiffs.

Sweetland's affidavit indicated that, between 1981 and 1986, he was township engineer for Patton Township, Centre County, and was familiar with all regulations required in connection with land development in that area. As is applicable here, he was involved with the "planning for and obtaining approvals in connection with the Oakwood Plaza Shopping Center Development." Paragraph 4. Sweetland also averred that the defendants had taken court action in the Supreme Court of New York, County of New York. There, Sweetland submitted responses, under oath, in support of his Motion For Summary Judgment In Lieu Of Complaint And In Opposition To Defendants' Cross Motions.

Sweetland's affidavit, prepared for presentment before and submitted to the Supreme Court of New York to buttress his motion for summary judgment, indicated that he was hired to perform engineering and consulting services for Joseph M. Aronow and Anthony Galioto with regard to the construction of a shopping center on the 14.8-acre site in Patton Township, Centre County. The architectural and buildings plans were to be prepared by CDA International, Inc. for Aronow and Galioto. Paragraph 9. It was never Sweetland's understanding that FL&S Associates was responsible for or in any way involved with consulting or architectural services relating to the planning and design of the Oakwood Plaza Shopping Center Project. Paragraph 11. .

Sweetland, pursuant to his affidavit, acknowledged advising Aronow, for whom he had prepared a preliminary General Site Plan, "both orally and in writing that submission of the [Final] Site Plan to Patton Township for approval was the next step required in order to progress the development of the project. Any subsequent approvals or design work could not proceed without the submission of the [Final] Site Plan for approval." Paragraph 22. This never came to pass, and Sweetland was never paid for his services to Aronow and Galioto.

According to Sweetland, increasing the interior retail space from 161,200 square feet to 193,382 square feet was calculated by him and provided to the defendants. And, as far as Sweetland was concerned, "no question that further work toward obtaining additional approvals and building permits required decisions and authorization to proceed by Oakwood, Aronow and/or Galioto[, and not anyone involved with FL&S Associates]." Paragraph 29, Exhibit 2.

The second affidavit of record is that of Harry K. Sickler, Jr., a partner of FL&S Associates. He also prepared a similar affidavit in support of Motion For Summary Judgment In Lieu Of Complaint And In opposition To Defendants' Cross Motion filed in the Supreme Court of the State of New York.[3] He adopted the affidavit as a response to the defendants' Petition to Open or Strike Judgment. It was alleged therein that the

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[3]The motion before the New York court is based upon facts and claims for relief that are identical to those contained in the two Pennsylvania actions that have proceeded to final judgment. Paragraph 43.

defendants,[4] by agreement dated July 14, 1986, had contracted to buy a 14.8-acre site of land in Patton Township from the plaintiffs. Subsequently, the two parties agreed upon a rider to the contract which changed the purchase price. Also, on December 23, 1986, the defendants executed an indenture ("Purchase Money Mortgage") in the amount of $1.1 million for the 14.8 acreage of land. Additionally, the defendants executed a Bond and Warrant obligating the three to pay FL&S Associates $1.1 million with interest at 9% per annum.

Once the Deed and Mortgage were recorded, the defendants defaulted on their obligations and failed to pay as required under the Bond and Warrant and the Purchase Money Mortgage. As a result, on October 31, 1988, FL&S Associates instituted a Complaint in Mortgage Foreclosure in Centre County (No. 88-2392). The defendants failed to respond. Thereafter, in accordance with Pa.R.Civ.P. 237.1, FL&S Associates provided notice of its intention to take a default judgment in the event the defendants did not respond to the complaint. Notice was delivered on November 15, 1988. By December 5, 1988, the defendants had filed no response. Accordingly, pursuant to Pa.R.Civ.P. 1037(b), a judgment in the amount of $1,287,713.88 was entered in favor of FL&S Associates and against the defendants by the Court of Common Pleas of Centre County.

Notice of entry of the judgement was provided to the defendants on December 5, 1988, and a writ of execution

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[4]State College Development Company was initially involved in the purchase of the realty. However, it assigned to Oakwood the agreement of sale. Paragraph 19, Sickler's Affidavit.

was issued on the judgment on the same day by the court. No action was taken by the defendants. By separate complaint filed September 9, 1988, FL&S Associates commenced an action on the Bond and Warrant against the defendants. The complaint on the Bond and Warrant was based upon the identical facts giving rise to the complaint in mortgage foreclosure.

Notification of the entry of the judgment in favor of the plaintiffs in the amount of $1,216,145.00 plus interest was sent to each of the defendants on September 9, 1988. On November 9, 1988, under Pa.R.Civ.P. 3117, 4406 and 4009, FL&S Associates served a request for discovery in aid of execution on each of the defendants. The defendants failed to respond, and, as a result, FL&S filed and served on the defendants a motion to compel and for sanctions for the defendants' failure to respond to discovery. The court granted the motion after argument for which the defendants did not respond or appear. In fact, no action was taken by the defendants since the entry of the judgment, and the situation remains status quo.

It was Sickler's contention, via his affidavit, that the defendants' claims of FL&S failing to meet certain of its obligations were based on "unsupported affidavits" submitted in the motion for summary judgment in lieu of complaint before the court in New York, and the same "are provably false." Paragraph 45, Sickler's Affidavit. For example, to Galioto's affidavit that Paragraph 1 of the Agreement of Sale made the plaintiffs responsible for obtaining on-site improvements, it was FL&S Associates' position that the "necessary approvals . . . were obtained. (Documentation of the approvals are included in the Affidavit of David Sweetland.)." Likewise, the approved number of square feet was increased by the zoning board

to 193,382 square feet of retail space on the site as well as FL&S providing an irrevocable letter of credit in the amount of $83,000.00 to guarantee the performance of the public improvements which included a "roadway."

On the question of engineering and architectural studies, the plaintiffs asserted that what plans existed were presented to the local authorities for approval. Since no "final site plan" had been completed by the defendants, FL&S Associates could not have been requested "to present what did not exist." Finally, FL&S Associates, through Sickler's affidavit, stated that the Agreement of Sale and Rider (contrary to the defendants' interpretation) required that "all engineering and architectural work was defendants' responsibility and that defendants could request FL&S Associates to submit defendants' designs for approval. No such request was ever made[.]" To the same effect, Sickler's affidavit alleged that Aronow's affidavit was "filled with misstatements and fabrications" regarding the obtaining of building permits, providing water and sanitary sewers, storm sewers and collection pools, and installing a roadway around the perimeter of the site by the defendants.

As far as FL&S Associates was concerned, it had "clearly performed its obligations by providing for the extension of utilities and the completion of the roadway." Similarly, FL&S was of the mind that the obtaining of building permits was not a *sine qua non* to any payments under the Bond and Warrant and Mortgage.

On June 15, 1989, a hearing was conducted to resolve the various complaints and motions filed by the respective parties regarding the confession of judgment and the attempt by the defendants to open or strike its entry.

Thereafter, the court issued an opinion and order dated July 14, 1989, denying the motion to open or strike judgment, one of the grounds being that the defendants' delay of almost 9 months in contesting the confession of judgment was "unreasonable . . . [and the defendants] fail[ed] to offer any explanation or excuse for such a delay." The July 14th order was reduced to judgment and an appeal to this Court followed.

By September 15, 1989, the plaintiffs had filed motions seeking to hold the defendants in contempt of court and impose sanctions for failure to answer interrogatories in aid of execution of the confession of judgment. Further, the plaintiffs argued that the defendants' appeal was "untimely" and a motion to quash would be filed by FL&S Associates. In response, the defendants alleged that their appeal was timely, that they were not showing contempt for the court and wished to have an adjudication on the merits of the case to establish that the plaintiffs were not entitled to recovery.

In particular, the defendants averred that the action should be vacated for the lack of subject matter jurisdiction for the plaintiffs' failure to join a necessary party-plaintiff, i.e., Saul Waxman, the individual who acted as a real estate broker in facilitating the transaction leading to the Agreement of Sale. Paragraph 6. And, because the addendum provided that no action could be instituted under the mortgage without written consent of Waxman or the purchase of his interest by the plaintiffs, the failure of either event to occur denied the court subject matter jurisdiction to entertain the suit. Paragraphs 13, 14 and 20.

On October 11, 1989,[5] the plaintiffs presented an answer to the defendants' petition seeking to vacate the judgment. They argued that the cause of action against the defendants was initiated in accordance with the terms of the Bond and Warrant, that the payment of 6% interest to Waxman was secured by the mortgage and was separate and distinct from the Bond and Warrant. Further, the plaintiffs asserted that the mortgage was not the subject of the proceeding, Waxman had no interest in the Bond and Warrant, and, although Waxman's consent was not obtained prior to commencing the suit under the Bond and Warrant:

> . . . he ha[d] specifically consented to the actions commenced by FL&S Associates, including the instant proceeding, as well as the proceeding to foreclose on the mortgage filed at No. 88-2392. Paragraph 11.

Finally, the plaintiffs urged that the defendants had misrepresented repeatedly, under oath, the facts relating to the proceedings before the court and continued to do so both in the petition and in the affidavits attached thereto. Paragraph 17.

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[5]In the interim, i.e., on October 2, 1989, the court held the defendants in contempt and directed each to pay $3,000.00 for failing to comply with its January 26, 1989, order. On October 10, 1989, the defendants filed a motion for reconsideration of the October 2nd order on the ground that, inter alia, they were guilty of no more than indirect criminal contempt warranting, under 42 Pa.C.S. § 4136(b), a maximum fine of $100.00. By order dated November 13, 1989, the fine was reduced to $100.00 plus reasonable attorney's fees to be determined at a later date.

On October 10, 1989, a hearing was conducted on the motions for a stay of discovery and to vacate judgment. At that time, counsel for the defendants told the court that he had discontinued, that morning, the appeal to Superior Court and presented the court with a copy of the praecipe for discontinuance to establish record evidence that there was no case pending before the Superior Court so as to deprive it of the "ability to act" on defendants' petition.[6]

The fundamental argument to vacate judgment was stated by the defendants to be "a relatively simple and straight forward argument that the judgment . . . [was] void . . . for failure of the plaintiff[s] to join as a party in the proceedings an indispensable party. That indispensable [party was] Saul Waxman." The remedy for this procedural misstep, so stated the defendants, was to dismiss the action. And, the fact that Waxman may have consented to the plaintiffs' suit after its institution was of no moment.

Counsel for the plaintiffs was permitted to present the position of his clients. In doing so, he observed that the initial argument that the court lacked jurisdiction, given the withdrawal of the appeal to Superior Court by the defendants, was a moot point. The simple issue, as viewed by counsel for the plaintiffs, was one in which the defendants were confusing the "Bond and Warrant" with the "Mortgage" – two separate documents which the

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[6]Our review of the record evidences the inclusion of no exhibit of the withdrawal of the appeal to Superior Court being attached to the stenographer's notes, despite the fact that there is an indexing system referring to the defendants/petitioners' exhibit # 1.

defendants believed should be construed together in resolving the case.

Counsel for the plaintiffs asserted that Waxman was not a party to the "Bond and Warrant" and had no interest in such a document. Thus, the case should focus on the resolution of the "Bond and Warrant" matter since the only instrument in which Waxman had an interest was the "Mortgage", an action in which judgment had been entered by default almost a year prior to the present suit in which no appeal or petition to open had been filed. The mortgage foreclosure action was continuing to proceed, so stated counsel for the plaintiffs.

Additional argument was heard from both counsel. Waxman testified that he agreed to allow the plaintiffs to proceed with their lawsuit against the defendants after its commencement. It was Waxman's understanding that he was to look to the plaintiffs to recoup his broker's commission on the real estate transaction. He had no claim against the defendants.

On October 18, 1989, the court issued an opinion and order dismissing the defendants' Rule To Show Cause. Once this order, along with the contempt order and fine of October 2, 1989, was reduced to judgment, an appeal to this Court ensued challenging both adjudications.

The first issue posed for our consideration concerns the finding by the court below, and endorsed by the plaintiffs, that the defendants' filing a notice of appeal on September 5, 1989, to Superior Court from the order of July 14, 1989, denying their petition to open or strike judgment divested the court of jurisdiction to vacate the judgment.

The law is settled in this Commonwealth that once a party takes an appeal to an appellate court, the trial court is divested of jurisdiction over the subject matter and "may no longer proceed further in the matter." Pa.R.App.P. 1701(a); *Corace v. Balint*, 418 Pa. 262, 210 A.2d 882 (1965); *Commonwealth v. Burkett*, 352 Pa.Super. 350, 507 A.2d 1266 (1986), allocatur denied 9/10/87. Instantly, an examination of the record discounts any divestature of jurisdiction in the court below.

For instance, we had attorneys for both parties acknowledging at the October 10, 1989, hearing that there had been a discontinuance of the plaintiffs' previous appeal of the July 14, 1989, order denying the plaintiffs' petition to open or strike judgment. This appeal was docketed at No. 545 HBG 89 by the prothonotary for the Superior Court in Harrisburg. A copy of the praecipe discontinuing the No. 545 HBG 89 appeal was presented, at least ostensibly, to the court below during the October 10, 1989, hearing[7] and a *copy* of the same was included in the appellants' "supplemental Record On Appeal" at lb-3b.

We would note at this juncture that the presentment of a *copy* of the praecipe discontinuing the previous appeal to afford the court below authority to entertain the issues to be decided is *not* consistent with this Court's disallowance of the use of appellate briefs as a substitute for evidence in the record generated and compiled at the trial level. See, e.g., *McCormick v. Allegheny General Hospital*, __ Pa.Super. __ , 527 A.2d 1028 (1987).

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[7]See note 6, supra.

It is the obligation of the appellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal. It is not for an appellate court to scour the dockets of the various prothonotaries to confirm or deny allegations of any party to an appeal. See, e.g., *Commonwealth v. Santana*, 321 Pa.Super. 299, 468 A.2d 488 (1983).

Nonetheless, even though we have the authority to remand this case for a supplementation of the record on this issue of "discontinuance" of a prior appeal at No. 545 HBG 89, see Pa.R.App.P. 1926, we have taken the liberty, in the interest of judicial economy, to determine that the original appeal of the July 14, 1989, order was withdrawn and discontinued by the appellants on October 10, 1989, the very date inquiry was made into why the judgment earlier entered in the case (on July 14, 1989) should not be vacated and why discovery in aid of execution should not be stayed. Accordingly, we find that the court was not deprived of jurisdiction under this theory of the case.

The second issue proffered by the appellants attributes the court below with error in holding that Waxman was not an indispensable party, and, therefore, a vacation of the confession of judgment was warranted.

It does not go unnoticed that the appellants do not assail the confession of judgment under the traditional tripartite test to determine whether a judgment should be

opened.[8] See *Cross v. 50th Ward Comm. Ambulance Co.*, 365 Pa.Super. 74, 528 A.2d 1369, 1371 (1987). Notwithstanding such a fact, the appellants assert the indispensability of Waxman as a party to the suit denied the court below of jurisdiction to hear and enforce any matter attendant to the confession of judgment issue.

In this Commonwealth, the issue of failure to join an indispensable party cannot be waived; if such a party is not joined, a court is without jurisdiction to decide the matter. See *Nelson v. Dibble*, 353 Pa.Super. 537, 510 A.2d 792 (1986). In deciding whether a party is to be labelled indispensable, the following factors are utilized in the equation:

> 1) whether the party has a right or interest related to the claim; 2) the nature of the right or interest; 3) whether the right or interest is essential to the merits; and 4) whether justice can prevail without violating due process rights of the absent party.

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[8]The appellants did so, however, by a petition to open or strike judgment filed May 10, 1989, and alleged therein that, inter alia, the appellees' failure to secure purported "permits" for and construct "roads" on the proposed shopping center site rendered the underlying "Bond and Warrant" with addendum unenforceable for lack of consideration. No mention was made at that time to the indispensability of Waxman to the suit so as to deprive the court below of jurisdiction to entertain the confession of judgment. Notwithstanding that fact, the petition was denied for the appellants' failure to assert "a meritorious defense." Lower Court Opinion, 7/14/89 at 3. No timely appeal was perfected from the July 14, 1989, order of court. In fact, the notice of appeal to Superior Court was filed *September 5, 1989*, well beyond the 30-day time-limit to attack a final order. See Pa.R.App.P. 903(a). This appeal was withdrawn, ultimately, on October 10, 1989. See note 7, supra and accompanying text.

Waksmunski v. Delginis, __ Pa.Super. __, __, 570 A.2d 88, 92 (1990) (Citations omitted); see also *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139, 15 L.Ed. 158 (1855); 3A Moore, Federal Practice § 19.07.

At bar, our examination of the record reveals the absence of the factors necessary to establish the indispensability of Waxman as a party-plaintiff.

As is accurately observed by the appellees in their brief to us at pages 13 and 14:

> First, the instant action relates to the Bond and Warrant, or Note, executed by Oakwood as well as Aronow and Galioto individually. Judgment was entered on that Note in September, 1988. Contrary to Appellants' assertion, Mr. Waxman has no pecuniary interest in the Note, is not a party to that Note, nor was he assigned any interest in the Note by FL&S Associates. FL&S Associates hold[s] the only interest in that Note. [See Bond and Warrant RA 231a.] A separate action on the mortgage was filed at No. 88-2392 on October 31, 1988. That action filed by FL&S Associates relates to the mortgage on the Oakwood property and it is that mortgage in which FL&S Associates has assigned a 6 percent (6%) interest to Mr. Waxman in order to provide security for the payment of commissions that may be owed to Mr. Waxman by FL&S Associates in the event that FL&S Associates is paid the balance owed on the Note. As is apparent from the Addendum to the Mortgage (RA 226a), Mr. Waxman is merely an assignee of a portion of FL&S Associates' interest in the mortgage, and that assignment is to secure the payment of certain additional commissions when and

if they become due. [See Mortgage with attached Addenda RA 223a.]

Second, Appellants defaulted in the mortgage foreclosure proceeding and have never moved to open or vacate that Judgment and no appeal from that Judgment entered on December 7, 1988 has ever been filed. In short, Appellants[] have filed this Petition in the *wrong proceeding*. [Emphasis in original]

Additionally, the court below has written that:

Mr. Waxman is not an indispensable party since complete relief can be accorded among those already party to the action without his presence, and his absence will not impair or impede his ability to protect his interest, nor will it leave Defendants at risk of incurring double, multiple, or inconsistent obligations. *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A.2d 491, 495 (1955). Mr. Waxman's interest in the mortgage was assigned by FL&S Associates solely to secure the payment of funds arising from the separate contractual relationship between Mr. Waxman and FL&S Associates.

Because Mr. Waxman's interest is in the mortgage and arises out of FL&S Associates[']' interest, and since Mr. Waxman's right to the payment of any additional funds relates to FL&S Associates' contractual obligation to him for additional broker's commissions, Mr. Waxman has no direct claim against the Defendants under the bond and warrant or otherwise. Not only is his presence not essential for granting relief in this matter, but it is wholly irrelevant and inappropriate in this action.

> Furthermore, Mr. Waxman is not an indispensable party to this action since his interest is in the mortgage and not the bond and warrant; and since that interest is not joint for purposes of Pa.R.Civ.P. 2227(a) ("persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants"). The addendum to the mortgage clearly states that FL&S Associates has *assigned* to Saul Waxman a 6% interest in the mortgage. It does not create a joint interest in the mortgage between the parties nor does it render Mr. Waxman an indispensable party to the present proceedings.

Lower Court opinion, 10/18/89 at 8-9 (Emphasis in original). We agree.

Because we hold that the court correctly found Waxman not to be an indispensable party to the lawsuit, this, of necessity, dispenses with the need to respond to the allegations of the appellants captioned Points III and IV in their appellate brief, both of which relate to Waxman and his purported status as an indispensable party and his failure to consent to the commencement of the present litigation.

The last contention relates to the supposed commission of error on the part of the court below in denying a stay of execution and holding the appellants in contempt for failing to comply with the execution procedures. See Appellants' Brief at 38.

Judge Grine, in his opinion, has artfully stated the case against the appellants' argument:

Defendants contend that because they have filed a Notice of Appeal, discovery in aid of execution should be stayed. However, Defendants have failed to comply with the Pa. Rules of Appellate Procedure in order to properly perfect the appeal or a supersedeas to stay discovery in aid of execution in this matter.

It is well-established that a prerequisite to the issuance of a supersedeas is the existence of a valid appeal. *See generally, Wilkinson v. United Parcel Service*, 158 Pa.Super. 34, 43 A.2d 414, 415 (1945). Only Defendants Aronow and Galioto have filed a Notice of Appeal. However, even Aronow and Galioto's Notice of Appeal of this Court's Order of July 14, 1989, was not filed until September 5, 1989, 53 days after the entry of the Order. Accordingly, the Notice of Appeal is untimely and cannot support the requested stay.

* * * *

Although Rule 1701 of the Pennsylvania Rules of Appellate Procedure states that the trial court no longer has jurisdiction in a matter after appeal has been taken, the exceptions to that rule provide that the trial court may continue to "enforce any order entered in the matter, unless the effect of the order has been *superseded* as prescribed in this chapter." This Court, therefore, retains jurisdiction to enforce its prior order of January 26, 1989, directing defendants to respond to discovery in aid of execution, absent an appropriate supersedeas issued by the Superior Court. This Court is empowered to enforce its orders, even after Notice of Appeal, by means of contempt. *See, Rosenberg v.*

Holy Redeemer Hosp., 351 Pa.Super. 339, 506 A.2d 408, 414 (1986).

* * * *

The Rules of Appellate Procedure require that Defendants properly perfect an application for supersedeas and file a bond with the appellate court in order to stay judgment or any post-judgment proceedings ancillary to judgment. *See, e.g.* Pennsylvania Rules of Appellate Procedure 1731-1738. The mere filing of an appeal does not automatically function as a supersedeas and stay the trial court's powers. *Shinn v. Stemler*, 47 A.2d at 295 (Defendant appealed Order denying Petition to O[pe]n Judgment. Court held Judgment not stayed by appeal). Defendants have neither requested a supersedeas nor filed any bond with the Superior Court.

* * * *

. . . Defendants have virtually no chan[c]e of success on the merits. As this Court determined, Defendants failed to demonstrate that they could fulfill the "meritorious defense" factors required to justify opening or striking a judgment. [See this Court's Order of July 14, 1989]. Accordingly, under any analysis, but especially under the no abuse of discretion standard applicable to Defendants' appeal, there is little likelihood that Defendants will prevail on appeal.

Inasmuch as the appeal filed by Aronow and Galioto is not only untimely, but is also without merit, a stay in this case would further prejudice Plaintiffs'

> attempts to execute on the judgment. The resulting detriment to Plaintiffs would be without reason and serve no legitimate purpose for Defendants' benefit, other than to continue to delay the enforcement of Plaintiffs' rights. Therefore, even if Defendants had properly requested a supersedeas and filed the appropriate security with the Court, they would not be entitled to a stay of discovery, or any other ancillary post-judgment proceeding of this Court.

Lower Court Opinion, 10/18/89 at 15-17.

We see no reason to alter the determination made by the court with regard to any of its rulings against the interest of the appellants. Accordingly, we will affirm its actions.

Orders affirmed.

MOMTGOMERY, J. Concurs in the Result.

DATED: JANUARY 15, 1991
JUDGMENT ENTERED

/s/Michael E. Williamson
DEPUTY PROTHONOTARY